This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

DL
4 B5
Y4.t2

A

TREATISE

ON THE

LAW OF DISTRESSES.

A

TREATISE

ON THE

LAW OF DISTRESSES.

By JAMES BRADBY,

OF LINCOLN'S INN.

THE SECOND EDITION WITH CONSIDERABLE ADDITIONS.

By JOHN ADAMS,

SERJEANT AT LAW.

LONDON:

JOSEPH BUTTERWORTH AND SON,

43, FLEET STREET.

1828.

J. AND T. CLARKE, PRINTERS, ST. JOHN-SQUARE, LONDON.

PREFACE

TO

THE SECOND EDITION.

THE Editor, in pursuance of the wishes of his deceased friend, Mr. BRADBY, presents to the Profession this New Edition of his valuable TREATISE ON THE LAW OF DISTRESSES. In preparing it for publication, the Editor has in no instance altered the plan or structure of the original Work, but has merely arranged the Author's MS. Notes, and incorporated them with the Text. The Treatise itself was written in the very earliest period of the Author's professional life, and bears strong marks of that vigor of intellect and acuteness of perception, with which he was so eminently gifted. The merit discernible in it, will probably be thought to justify

the anticipations which his friends, at that time, entertained of his future success and distinction. These anticipations have indeed, unhappily, not been realized. For he was deterred by severe and continued indisposition from encountering the fatigues and anxieties of the bar; and thus, his powerful intellect and extensive knowledge has been useful only to his friends and pupils.

It is earnestly hoped that the re-publication of this small Treatise (which has been justly esteemed by the profession) will be gratifying to those who enjoyed his confidence and friendship, and who can alone appreciate his memory.

Brick Court, Temple,
Easter Term, 1828.

PREFACE

TO

THE FIRST EDITION.

It has been my design in the following Work, to present to the Reader, a concise but systematic Treatise on the Law of Distresses; confining my inquiries to such things as were originally the subjects of a Distress (properly so called) at the common law. On this account, I have omitted the consideration of those Distresses which arise wholly out of the provisions of particular statutes; such as Distresses for poor's rates, or under the authority and directions of canal, or inclosure acts; for which we must have recourse to the particular statutes themselves authorizing these Distresses, or, as they may in general be called, statutory executions. For a similar reason, I have omitted the consideration of Distresses to recover any duty or debt due to the king, except that of rent. For although such proceedings are in the old books constantly termed Distresses, they are, in fact, prerogative executions by seizure and sale.

Another topic analogous to the Law of Distress, namely, the process by Distringas to compel appearance in real or personal actions, I have also passed over with very slight notice; considering it as a subject which more properly belongs to an inquiry into the practice of courts, than to a Treatise on the Law of Distresses; and have therefore contented myself with offering to the Reader, on this subject, the passage cited from the Lord Chief Baron Gilbert, which will be found at the conclusion of the eighth chapter of the present Work.

As it has been my wish to render the following Treatise practically useful, I have introduced in the twelfth chapter, the fullest directions for the making and conducting of a Distress, either for rent or any other cause.

J. B.

Brick Court, Middle Temple.
January, 20, 1808.

CONTENTS.

CHAPTER I.

Of the Origin, Progress, and Nature of the Law of Distresses.

	Page
Definition of a Distress	1
Origin of the Law of Distresses	1, 3
Progress of the Law of Distresses	5, 11
Causes of a Distress	11, 13

CHAPTER II.

Of a Distress for Rent, with relation to the several Kinds of Rent.

Of a Rent Service	14
Rent-Charge	*ib.*
Rent-Seck	15
Out of what Rent may be reserved	*ib.*
Certainty of Rent	17
By what Deed to be reserved	*ib.*
To whom to be reserved	18

Page
To be reserved conformably to the Estate . 19
Is incident to the Reversion and Services . 20
Seisin of Rents 21
Fee-farm Rents 22
Rents of Assize, &c. . . . *ib.*

CHAPTER III.

Of the Persons who are entitled, in respect of their Estate or Interest, to distrain for Rent.

Of the Apportionment, Suspension and Extinction of Rents . . . 24
Apportionment, &c. of a Rent-Service . 26
Distress by the Lord, for a Rent-Service . 30
claiming by Escheat . *ib.*
Distress for a Rent-Charge . . 31
Apportionment, &c. of a Rent-Charge . 33
Seisin of a Rent-charge when necessary . 35
Rent-Charge assignable 36
within the Annuity Act . *ib.*
Distress by Coparceners . . . 37
by Co-Heirs in Gavelkind . . 39
by Joint-tenants . . . *ib.*
by Tenants in Common . . 41
by Husband and Wife . . 42
for Rent on a chattel Interest of the Wife . . 44
on a freehold interest of Ditto 45
by Tenant by the Curtesy . . 46
by Tenant in Dower . . *ib.*
by ditto by Free-Bench . . 48
by Tenant in Tail . . . *ib.*
by Tenant for Life, &c. . , 49

Page
Distress by Tenant by Elegit . . 49
by Conusee of a Statute . . 50
by Executors and Administrators . *ib.*
by Heirs . . . 56
by Devisees and Legatees . . 59
by Trustees, Assignees, &c . . 61
by Guardians . . . *ib.*
by Committees of Lunatics . . 62
by Receivers . . . *ib.*
by Corporations . . . *ib.*
by the King . . *ib.*
by his Grantee . 63
by other Corporations sole *ib.*
by Corporations aggregate 64
by a Lord for Copyhold Rents . 65
by Mortgagor and Mortgagee . 67
by Lessors on Leases for years, &c. . *ib.*
for the Rent of furnished Lodgings . 71
for double Rent . . . *ib.*

CHAPTER IV.

Of the Persons whose Goods are liable to be distrained for Rent.

Distress on the Possession of the King . 73
of his Grantee . 74
on the Goods of Ambassadors, &c. . 75
on Persons having an Estate in the Land *ib.*
on Coparceners . . . *ib.*
on Joint-tenants . . . 75
on Tenants Goods for a Rent-charge . 76
on Executors or Administrators . 77

Page

Distress on Persons holding under an implied Tenancy . . . 77
on Under-tenants . . 78
on Goods of a Stranger . . 79
on Goods in the Custody of the Law . 80
wherein of the Stat. 8 Anne, c. 14. 81
on Goods the Custody of which has been abandoned . . 84
on the Goods of a Bankrupt . 85

CHAPTER V.

Of the Time limited, for making a Distress for Rent.

Of the Demand of Rent . . . 87
Rent when due 89
Distress after Expiration of the Term, at the common Law . *ib.*
on the Stat. 8 Anne, c. 14. . 90
Time of a Distress on Goods fraudulently removed 91
Of making several Distresses for the same Rent 92

CHAPTER VI.

In what place a Distress for Rent may be made.

Distress by the King where to be made . 93
Of a Distress out of the Lord's fee . 92
in the Highway . . *ib.*
in the Land out of which the Rent issues . . 95
on Goods clandestinely removed 96

CHAPTER VII.

Of a Distress for Services, Suits, Reliefs, and Customs.

	Page
Of the Nature of the ancient Services .	98
These Services altered by several Statutes .	99
by Stat. 12 Car. 2. c. 24.	*ib.*
Of Tenure in Socage . . .	100
Of Fealty	101
Of Heriots . . .	*ib.*
Of Suit of Court . . .	107
Of the Court Baron . . .	*ib.*
Customary Court . .	110
Of Suit to the Mill . . .	*ib.*
Of other Copyhold Services . .	111
Of Reliefs . . .	*ib.*
Of the Seisin of Services . .	114
Of Customs . . .	*ib.*

CHAPTER VIII.

Of a Distress for Fines and Amerciaments.

Of Fines imposed in the Tourn or Leet .	117
Difference between Fines and Amerciaments	118
Amerciament for non-attendance in the Leet .	120
Of Affeerment . . .	122
Amerciament for Joint Offences . .	124
Where such Distress may be made .	124
Whose Goods may be distrained for it .	125
Distress for Penalties and under By-Laws .	*ib.*
Of a Distress to compel Appearance .	126

CHAPTER IX.

Of a Distress for Tolls and Port-Duties.

	Page
Nature of Toll . . .	129
Toll-traverse . . .	130
Toll-thorough . . .	*ib.*
Of a Distress for Port-Duties . .	131

CHAPTER X.

Of a Distress of Things Damage-Feasant.

Origin of this Distress . .	135
By whom to be made . .	136
On whose Goods . . .	137
For what Injury . . .	139
At what time to be made . .	141
In what place . . .	*ib.*

CHAPTER XI.

Of the Things which may be taken as a Distress.

No Distress on things in which there cannot be a Valuable Property .	143
nor of things in present use .	*ib.*
nor of things in the way of Trade	144
Of a Distress on the Goods of a Stranger .	145
on the Implements of Trade and Husbandry, &c. . . .	146

Page
Of a Distress on perishable Goods . . 147
on things annexed to the Freehold 148
on things in the Custody of the Law *ib.*

CHAPTER XII.

Of the manner in which a Distress should be made, and afterwards disposed of.

Of a Distress for Rent
by the Landlord . . 149
by his Bailiff . . 150
Warrant of Distress . . *ib.*
Notice and Inventory . . 151
Removal of the Distress . . 154
Appraisement and Sale . . 156
Of proceeding where Goods are taken in Execution . . . 159
Ditto in case of fraudulent Removal . 160
Distress of Corn, Hay, or Straw, under Stat. Wm. and Mary. . 162
of growing Crops under Stat. 11 Geo. 2. c. 19. . *ib.*
Of impounding the Distress . 163
Of a Distress not made for Rent
of disposing of a Distress at Common Law 169
of impounding a Distress at Ditto . 170
by Custom . 171
of disposing of a Distress for a Fine or Amerciament in a Court-leet . *ib.*

CHAPTER XIII.

Of a wrongful, irregular, or excessive Distress, and of the several Remedies for the same.

Of a wrongful Distress . . 173

Page

Action on the Stat. of Wm. and Mary for wrongful Distress . 176
on Stat. Marlebridge, for a Distress made out of the Lord's Fee 177
ditto for a Distress taken in the Highway . . 179
Remedy for a wrongful Distress in ancient Fees of the Church . *ib.*
Action on Stat. of Marlebridge for a Distress for Services not due . 180
ditto for an unlawful Distress of Beasts of the Plough . 182
Of the Writ of Recaption . . 183
Of an irregular Distress . . 185
Irregularity in driving and impounding a Distress . . 188
Of an excessive Distress . . 191
Remedy for the same by Action on the Stat. of Marlebridge . *ib.*

CHAPTER XIV.

Of Rescous and Pound-Breach, and of the several Remedies for the same.

When Rescue may be made . . 194
By whom to be made . . . *ib.*
Where to be made . . . 195
Of the Writ of Rescous . . 197
Of the Defendant's Plea . . *ib.*
Of Pound-Breach at Common Law . 199
Of the Writ de Parco-fracto . . 200
Remedy for Rescue or Pound Breach, under the Statute of Wm. and Mary . . 201

TABLE

OF THE

CASES CITED.

A.

	Page
Adley *v.* Reeves	125
Aier *v.* Rashton	174
Allen *v.* Bayley	168, 174
Always *v.* Broom	174, 197, 199, 200
Amherst *v.* Skynner	37
Andrews *v.* Dixon	82
Ankerstein *v.* Clarke	44
Anonymous, 1 And. 31.	200
——— 2 And. 194.	60
——— 1 Atk. 102.	86
——— Comberb. 17.	95
——— Cro. Eliz. 13.	92
——— Dyer 168 b.	165
——— —— 177.	191
——— —— 312.	182
——— Godbolt 11.	190
——— Sir T. Jones 25.	170
——— Sir W. Jones 253.	138
——— Keilw. 96.	89
——— —— 104.	47
Anonymous, Keilw. 152.	132
——— 1 Leon. 302.	52, 53
——— 2 ditto, 7.	79, 146
——— 3 ditto, 13.	114
——— —— 15.	142
——— Moore 7.	44
——— Lord Raym. 36.	19
——— 1 Salk. 191.	150
——— 3 do. 136.	147
——— —— 332.	107
——— Saville 125.	74
——— 1 Ventr. 71.	132
Anscomb *v.* Shore	168, 177
Appleton *v.* Doily	52
Arnett *v.* Garnett	82
Arris *v.* Bradshaw	170
Athill *v.* Corbet	143
Attorney-General *v.* Sands	30, 35
——— *v.* Mayor of Coventry	63
Austin *v.* Bennet	106
——— *v.* Whitread	141

B.

Page
Back v. Meats 98
Baker v. Leather 139
—— v. Spain 88
Baldwin v. Tudge 123
Bally v. Wells 16
Baynes v. Smith 144
Beavan v. Delahay 91
Bedell v. Constable 62
Bedford (Duke of) v. Alcock 122, 123
Bellasis v. Burbriche 148, 201, 202
Bendloss v. Philips 59
Bennet's Case 82, 160
Bevil's Case 6, 21, 22, 174, 181, 182, 194
Birch v. Wright 66, 70
Bishop v. Mountague 177
Bissett v. Caldwell 144
Blades v. Arundale 84
Bland v. Inman 59
Blaxton v. Heath 45
Bliss v. Collins 27
Blunt v. Whitacre 121, 122
Bodkin v. Chancellor 177
Bolton v. Canham 77
Boraston v. Green 91
Borrough's Case 87
Bowles v. Poore 43
Bradbury v. Wright 22
Bradyll v. Ball 86
Brathwaite v. Cooksay 77, 91
Braunche's Case 110
Branscomb v. Bridges 176, 177
Bristow v. Wright 84
Bromhall v. Norton 142
Brooke v. Hustler 123
Brown v. Dunnery 87, 88
Browning v. Dann 95
Bruerton's Case 106, 109
Buckley v. Buckley 86
Bull v. Gibbs 78
Bullen v. Godfrey 169
Buller's Case 151, 154
Bulpit v. Clarke 22
Buckley v. Taylor 69, 89
Page
Burne v. Richardson 70
Burt v. Moore 139
Burwell v. Harwell 29
Butler v. Baker's Case 37, 154
Butt's Case 16, 68
Buszard v. Capel 96

C.

Cader v. Oliver's Case 60
Chase v. Chase 83
Churchill v. Evans 138
Child v. Sands 189
Chetwood v. Crewe 123
Clarke v. Tucket 125, 169, 192, 193
Clarke's Case 125
Clarke v. Gaskarth 148
Clement v. Milner 141
Clerk v. Gurrel 32
Clun's Case 49, 59
Cobb v. Stokes 72
Cobham (Lord) v. Browne 130
Colborne v. Wright 33
Cole v. Sury 17
—— v. Davis 84
Coleman v. Eyles 159
Colt v. Bishop of Coventry 47
Colton v. Smith 132
Colyer v. Speer 82
Combe's case 181
Commin v. Carre 172
Conyers v. Franke 123
Cook v. Cook 83
Cooke v. Herle 32
Cooper's case 68
Corbett's case 50
Cordell v. Clifton 52
Cother v. Merrick 20, 57—59
Cottsworth v. Bettison 200
Cranley v. Kingwell 88, 89
Crispe v. Bellwood 130, 132
Cromwell's case 46
Croom v. Talbot 16, 17
Croser v. Thomlinson 144
Crowther v. Ramsbottom 154, 192
Culley v. Spearman 138

D.

	Page
Dacre *v.* Nixon	120
Dalston *v.* Reeve	16
Darling *v.* Hill	83, 160
Darrell *v.* Wilson	19, 57, 69
Davis *v.* Connop	91
Davidson *v.* Moscrop	122
Davies *v.* Powell	143
Dawson *v.* Linton	79
Dean and Chapter of Windsor *v.* Gover	16
Descharmes, Ex parte	86
Dighton *v.* Greenvill	50
Dixon *v.* Harrison	32, 35, 36, 38, 52
—— *v.* James	137
Dod *v.* Saxby	83
—— *v.* Monger	154, 167, 186—196, 201
Doe *v.* Batten	72
—— d. Holmes *v.* Darby	71
—— d. Hollingsworth *v.* Stennett	70
—— d. Knight *v.* Quigley	70
—— d. Newby *v.* Jackson	*ib.*
—— d. Vaughan *v.* Meyler	28
Dorrell *v.* Andrews	28
Doubitofte *v.* Curteene	16
Drake *v.* Munday	18
Druce *v.* Bailey	56
Duncomb *v.* Reeve	167
Dunk *v.* Hunter	18, 70
Duppa *v.* Mayo	55, 71, 89

E.

Eaton *v.* Southby	78, 84
Edgcomb *v.* Sparks	147
Edrich's case	54
Edwards *v.* Moseley	103
——— *v.* Halinder	140
Ellis *v.* Rowles	137
Etherton *v.* Popplewell	154, 192
Evelin *v.* Davis	123
Ewer *v.* Moyle	27
Exhall *v.* Partridge	79

F.

	Page
Fairclaim d. Fowler *v.* Shamtitle	65
Fairfax *v.* Gray	78
Faircombe *v.* Pinch	95
Fawkner *v.* Bellingham	21
Finlay *v.* Seaton	187
Firth *v.* Purvis	174, 194, 202
Foster *v.* Jackson	167
Follet *v.* Troake	171
Fowke *v.* Joyce	79, 145, 146
Fox *v.* Vaughan	88
Francis *v.* Wyatt	144, 145
Frasel *v.* Morris	141
Furneaux *v.* Fotherby	97

G.

Garland *v.* Jekyll	105
Geere *v.* Burkensham	117
Gill *v.* Gawin	79, 146
Gilman *v.* Elton	145
Gimbart *v.* Pelah	164, 191
Gisbourn *v.* Hirst	145
Gloucester (Bishop of) *v.* Wood	105
Godfrey's case	119, 120, 121, 124
Gore *v.* Gofton	82
Gorton *v.* Fawlkner	146, 148
Gouge *v.* Hayward	60
Gough *v.* Howard	69
Gould *v.* Bradlock	95
Graham *v.* Tate	79, 188
Griesley's case	13, 119, 124, 172
Greaves *v.* D'Acastro	81
Green *v.* Austen	83
Griffin *v.* Scott	155
Groenvelt *v.* Burwell	154
Grove, Ex parte	86
Gryffyth *v.* Biddle	124
Guilliams *v.* Munnington	36
Gwilliam *v.* Barker	83, 84

H.

	Page
Hall *v.* Harding	136, 137
Hale *v.* Turbott	119
Halsey *v.* Hales	37
Harrison *v.* Brough	134
——— *v.* Barnby	42
Harwell *v.* Burwell	80
Hassell d. Hodgson *v.* Gowthwaite	32
Heddy *v.* Walhouse	130
Hefford *v.* Alger	184
Hegan *v.* Johnson	18, 70
Henchett *v.* Kempson	82, 83
Heshord *v.* Wills	132
Hewett *v.* Norberow	172
Hickman's case	134
Hill *v.* Smith	130, 131
Hoby *v.* Roebuck	68
Hodgson *v.* Gascoigne	82
Hodesdon *v.* Gresil	137
Hodgkins *v.* Thornbrough	26
——— *v.* Robson	28
Holcroft *v.* Steel	129
Holloway *v.* Smith	*ib.*
Holman *v.* Tooke	201
Holt *v.* Sambach	19
Hool *v.* Bell	51
Hopkins *v.* De Robeck	75
Horne *v.* Lewin	88
Horkins *v.* Knight	83
Hoskins *v.* Robins	137, 139
Howell *v.* Sarnback	88
Hudson *v.* Snelgar	42
Humphrey *v.* Damion	78
Hungerford *v.* Haviland	106, 114
Hunt *v.* Bourne	108
Hutchins *v.* Chambers	92, 147, 183, 192

I.

	Page
Jemmott *v.* Cowley	15, 182
Jennings *v.* Playstowe	195, 198
——— *v.* Cousins	174
Jordan *v.* Wickes	46
Iremonger *v.* Newsam	75
Isaac *v.* Ledgingham	116, 126

K.

	Page
Keech *v.* Hall	67
Kidwelly *v.* Brand	87, 88
Kimp *v.* Cruwes	79, 140, 146
Kind *v.* Amery	87
Kingsmill *v.* Bull	115
Kinrick *v.* Pargiter	136
Knowles *v.* Solly	165

L.

	Page
Lancaster, case of the Duchy of	63
Lanyon *v.* Carne	104, 105, 107
Laugher *v.* Humphrey	23, 48, 65
Lawnson's (Mayor of) case	141
Lawson *v.* Storey	202
Legg *v.* Strudwick	70
Lee *v.* Lopes	82
Leight *v.* Pym	130, 133
Leigh *v.* Shepherd	39
Lewis *v.* Harris	91
Lightfoot *v.* Lenet	129
Lincoln (Earl of) *v.* Fisher	119
Lindon *v.* Collins	22
Lindon *v.* Hooper	177
Lingen *v.* Payn	40
London (Mayor of) *v.* Hunt	117, 132
——— ——— *v.* Mayor, &c. of Lynn	133
——— ——— *v.* Cole	271
Long *v.* Buckeridge	22, 35, 60, 77
Lovelace's case	115
Lynne *v.* Moody	192
Lynn (Mayor &c. of) *v.* Taylor	117

M.

	Page
Macdonel *v.* Welder	78
Macleish *v.* Tate	69, 89
Major *v.* Brandwood	103, 106
Mallory's case	31

Page
Manby v. Long 64
Mary's case 136
Matthews v. Cary 123
Maund's case 36, 88
Messing v. Kemble 187
Meriton v. Gilbee 55
Midgley v. Lovelace 41
Mitchell, Clerk, ex parte 37
Morgan d. Dowding v. Bassell 70
Moore v. Munday 192
—— v. Pyrke 79
Moreley v. Pierson 130
Moss v. Gallimore 66, 154
Mountjoy's (Lord) case 16, 68
Myles v. Willoughby 33, 60

N.

Newman v. Anderton 16, 17, 71
Niblet v. Smith 148
North v. Wingate 191
North v. Wyard 43
North's (Lord) case 114
Norton v. Harvey 56
Nottingham (Mayor of) v. Lambert 131
Nuttall v. Staunton 90

O.

Oates v. Frith 19, 57
Odiham v. Smith 102, 103
Odill v. Tirrell 42
Ognel's case 32, 45, 46, 52, 53
Oliver v. Emsonne 35
Osborne v. Walleden 43
——— v. Wickenden 44
——— v. Shire 103
Osbuston v. James 133, 134, 144, 147
Owen v. Legh 176

P.

Paget v. Gee 49
Palgrave v. Windham 83, 160

Page
Palmer v. Strange 92
Panton v. Jones 70
Parker v. Combleford 116
——— v. Harris 17
Parkin v. Radcliffe 116
Parmenter v. Webber 68
Parry v. Hindle 44
Parslow v. Cripps 84
Partridge v. Emson 189
——— v. Naylor ib.
Patchett v. Bancroft 125
Payn v. Partridge 133
Pelham (Lord) v. Pickersgill 131
Pennant's case 89
Penruddock's case 6
Peacock v. Purvis 83, 84
Perkins v. Butterfield 167
Peter v. Knoll 103
Peto v. Pemberton 35
Pierson v. Ridge 116, 119
——— v. Ridley 171
Pilkington's case 168, 175
Pilkington v. Hastings 175
Pim v. Greville 87
Pitt v. Shew 154
— v. Snowden 62
Plummer, Ex parte 85
Pool v. Neel 49, 50, 52, 60
Poole v. Longueville 80, 140
Pope v. Davis 189
Potter v. North 151
Poultney v. Holmes 68
Porphrey v. Leginham 182
Prideaux v. Warne 130, 132, 134
Pullen v. Palmer 39, 41, 43

R.

Randall v. Jenkins 19, 59
Reed v. Burley 143, 144, 145
Rex v. Cotton 81, 167
—— v. Dale 81
—— v. De Coux ib.
—— v. Ellis 16
—— v. Hodder 81
—— v. Pritchard ib.
—— v. Southerby ib.
—— v. Dickenson 121

Page
Rex v. Corporation of Maidenhead 133
—— v. Speed 169, 170
—— v. Clarke 189
—— v. Ledgingham 192, 193
Richmond v. Butcher 57
Rickman v. Garth 16
Robinson v. Walter 144
Roberts v. Young 168
Rogers v. Birkmire 70, 95, 102, 106
Rowleston v. Alman 121, 171

S.

Sacheverell v. Frogate 19, 20, 48, 58, 59
St. John's College v. Murcott 81
Salter v. Brunsden 176
Scroggs v. Stephenson 171
Semayne's case 95
Shapcot v. Mugford 139
Shaw v. Taylor 104
Shipwick v. Blanchard 176, 177, 187
Shopland v. Rydler 62
Shrapnel v. Vernon 37
Simpson v. Hartopp 143
——— v. Bithwood 117
Six Carpenters' case 88, 89, 168, 174, 185, 194
Smallman v Agborow 46
Smith v. Mapleback 69
—— v. Shepherd 110, 131, 134, 147, 179
—— v. Russel 82, 83
—— Ex parte 26
Snelgar v. Henston 42
Spencer's case 17
Stafford's case 58
Stafford (Earl of) v. Buckley 68
Stanfield v. Hicks 70
Staunton v. Hobart 42
Stedman v. Page 37
Stephens v. Howard 124
Stevens v. Haughton 123
Stevenson v. Lombard 28
Storey v. Robinson 143

Page
Stukely v. Butler 38
Swinnerton v. Miller 18, 27
Syliard's case 106
Syllivan v. Stradling 114

T.

Talbot's case 106
Talentine v. Denton 16
Tanfield v. Rogers 70
Tanistry, case of 115, 116, 170
Taunton v. Costar 140
Tewkesbury (Bailiff of) v. Diston 130
Thetford v. Thetford 42
Thetford, Case of the Mayor of 64
Thomson v. Masheter 145
Thornton v. Adams 98
Thresher v. Chapman 138
Thunder d. Weaver v. Belcher 67
Thurston v. Prentice 88
Timmins v. Rowlinson 71
Tinckler v. Prentice 88
Tresham's case 200
Trinity College Cambridge v. Brown 105
Trye v. Burgh 173
Truman v. Walgan 131
Tunbridge's case 143
Turner v. Lee 54, 69
Turner v. Turner 68
Tutter v. Fryer 90
Twells v. Colville 83

V.

Vaspor v. Edwards 140, 141, 166, 167, 168, 174
Vinkenstone v. Embden 117, 134, 135, 147

W.

Wade v. Baker 62, 138
Wade v. Marsh 56

	Page
Wallace *v.* King	156, 187
Walker *v.* Rumbold	94, 154, 156, 165
Wallis *v.* Saville	92
Wankford *v.* Wankford	44
Warden and Commonality of Sadlers' case	63
Ward *v.* Knight	133
Waring *v.* Dewbury	82, 83, 160
Warrington *v.* Mosely	129, 130
Washbourn *v.* Black	155
Watson *v.* Main	97
Welch *v.* Myers	98
Welch *v.* Ball	143
Wells *v.* Cotterel	126
West and Ux. *v.* Hedges	83
White *v.* Gerish	29
White *v.* West	34
Whiteman *v.* King	138
Wilkes *v.* Kirby	132
Wilton *v.* Hardingham	123
Willis *v.* Fletcher	138
Williams *v.* Ladnar	139
Winterbourne *v.* Morgan	155, 187, 188
Wise *v.* Bellent	43
Witherhead *v.* Harrison	32
Wood *v.* Tate	64
Wood *v.* Lovatt	121
Woodcroft *v.* Thompson	164, 190, 192
Woodland *v.* Mantel	103, 106
Wykham *v.* Wykham	49

Y.

Yard *v.* Eland	44
Yarmouth (Mayor of) *v.* Eaton	132

Z.

Zouch d. Ward *v.* Willingate	71

A

TREATISE

OF THE

LAW OF DISTRESSES.

CHAPTER I.

Of the Origin, Progress, and Nature of the Law of Distresses.

A DISTRESS is the taking of a personal chattel, without legal process, from the possession of a wrong-doer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand. Definition of a distress.

This remedy appears to be so ancient in the laws of England, that it is probably coeval with the common law itself; or may rather be considered, as one of those principles which collectively constitute that system which we denominate the common law. The antiquity of the doctrine of distress renders its origin obscure; for it is not easy to trace the rise and progress of those usages which obtained among a rude and unlettered people, who entrusted the preservation of their laws to a vague and uncertain tradition. But whatever may have been the period at which the remedy of distress was adopted by the English law, it seems evidently to have been posterior to that time, in which the feudal system prevailed in its fullest rigour; for as a very learned writer on this subject, the Lord Chief Baron Gilbert,

CHAP. I.

has observed, the non-performance of any of those services for which originally a distress was made, was by the feudal system an absolute forfeiture of the feud; the rigour of which law was afterwards mitigated, and these forfeitures changed into distresses. (*a*) It is the opinion of the same learned writer, that this change was adopted from the pignorary method of the civil law; by which, the creditor was in some cases allowed to sell a part of the pledges which he held as a security for his debt. (*a*) But there seems to be a material difference between the Roman and English laws in this respect: for in the former, both the pignus and the hypotheca were pledges delivered by the debtor, or taken by the creditor, in consequence of a particular stipulation; (*b*) whereas the remedy of distress by the English law, was always a right of taking out of the hands of another, *without his consent*, a pledge, or security, for the satisfaction of a demand. There does not therefore appear to be much analogy between the principles of the Roman and English laws in this respect; nor does it seem probable, that the remedy of distress in the latter, is derived from the doctrine of pledges in the former, any further than as the mild and equitable principles of the civil law contributed in this, as in many other respects, to correct the injustice, and soften the rigour of the military systems of modern Europe.

Whatever may have been the origin of the Law of Distress, with relation to the Roman code, it seems to have prevailed among the Gothic nations of the Continent at a very early period; and from them to have been adopted by the English law. This is evidently the opinion of Sir Henry Spelman, who observes, that our Saxon ancestors derived

(*a*) Gilb. on Distresses. &c. by Hunt, p. 2., and Sullivan, Lect. 6th.

(*b*) Vide Digest, Lib. 20. Tit. 5. De Distractione Pignorum et Hypothecarum. passim. Thus Calvin says, Pignoris, appellatione eam rem proprie contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit. At eam quæ sine traditione, nudâ conventione tenetur proprie hypothecæ appellatione contineri dicimus. Lexic. Jurid. voce Pignus. Et vide Spegelii Lexic. Jurid. in eâdem voce. There was indeed the Pignus Prætorium, which was compulsory, but that was the result of a judicial proceeding.

from the Continent, the use of the Pound, (or place in which things distrained are to be secured) for, that among the laws of the Ripuarii, (Tit. 82. s. 2.) is found the following passage, "*Si quis, peculium alienum in Messe adprehensum ad Parcum minare non permiserit,* 15 *Sol. Culpabilis judicetur.*" (*d*) Sir Henry Spelman adds, *Parci etiam meminit Lex Anglorum et Werinorum haud multo recentior, tit.* 7. *s.* 1. *Qui gregem equarum in parco furatus fuerit, in triplum componat.* These laws indeed regard only one kind of distress, that of cattle doing damage on the land; but as they advert so explicitly to the impounding of the distress, we may infer from them, that the general principle of the law of distresses, both as to the making and conducting of them, was already well known and established.

One of the most ancient causes for which distresses were usually made in England, seems to have been the non-performance of the services which the tenant owed to his lord. These services during the early periods of the feudal system, consisted principally of military duties, many of which were of uncertain extent. On account of this uncertainty, it was not easy to estimate with precision the amount of the lord's claim; and therefore for the subtraction of such services, distress was rather an unsuitable remedy: for as Fleta observes, "*In qualibet captione, tria principaliter requiruntur; videlicet, certus locus, certa causa, propter quam facta fuit, captio et seisina alicujus.*" (*e*) But afterwards when the personal service of the military tenants was commuted into a sum of money, called escuage, distress became the regular method of recovering that and the other fruits of the military tenure; the damage the lord sustained, being now capable of a reduction to a certainty. (*f*)

The remedy of distress did not however immediately succeed to the forfeiture of the feud; for after the rigour of the ancient system had in some degree relaxed with regard to the absolute forfeiture of the land, still, for the non-performance of any of the feudal duties, the lord was entitled to enter upon the tenant, and take the land into

(*d*) Spelm. Gloss. voce Parcus.

(*e*) Fleta lib. 2. cap. 49.

(*f*) Sullivan, lect. 10.

CHAP. I. his own possession, until he had obtained a sufficient satisfaction for his damages. "But as this seisure frequently "disabled the tenant from making that satisfaction, especially if he had no other lands, this, after some time, was "thought still too rigorous; and in its stead was substituted, the seisure of the cattle and other moveables found "on the land, and the detention of them as a pledge, until "the damages were answered." This was a "sufficient "security to the lord, as it rarely happened, but that there "was sufficient found to answer his demand for one failure, "and the tenant was not, (as not being deprived of his "possession) reduced to an incapacity of paying his rent of "services, and thereby recovering his pledges." (g)

But this remedy of distress, however mild and indulgent it may appear in comparison with the rigour and severity of the ancient laws of forfeiture, soon became in the hands of powerful lords, an instrument of great oppression; and was almost as grievous to the tenants as the forfeiture itself; "there being no difference to the tenant, between the lords "seizing the land itself, and turning the tenant out of his "possession; and his stripping him of the whole produce "or fruits of it at his pleasure."

"And not only the produce of the farm, but the inducta "and illata, and every thing that was brought on the land "were liable to the lord's distress. By these means all the "plunder of the war which the vassal had brought home, "was often carried off by the lord, and the distress by "his power removed out of the reach of the tenant, and "all this on the slightest occasions."

"This power as it was practised by the lords, did not "only oppress the tenants, but put them so entirely under "the power of their lords, as to enable them to bring "great numbers of their vassals into the field against "their prince, and thereby disturb the public peace of "the kingdom."

"There were yet two other inconveniencies which arose "from the abuse of these distresses."

"The first was, that in the disputes and contests which

(g) Sullivan, lecture 10.

"frequently arose between neighbouring lords themselves, "whilst each lord was endeavouring to enlarge his bounds, "and encroach on his neighbour's property, the tenants "were generally distrained by both: by which the tenant "was brought within the seigniory, and so became subject "to that feudal dependance and service, which accompanied "the military tenure."

"The other mischief was, that when the lords had brought "them under their dependance, they would distrain them "for the amerciaments of their courts; and as the statute of "Marlebridge expresses it, *graves ultiones fecerint, et dis-"trictiores quousque redemptiones receperint ad voluntatem "suam:* and what made the abuses the more insupportable "was, that these lords, *per Ministros Domini Regis, justi-"ciari non permittant, nec sustineant quod per ipsos li-"berentur Districtiones, quos authoritate propria fecerint ad "voluntatem suam,* so that they seemed to throw off the "authority of the law, and to subvert the fundamental "rule, that no property was to be altered without the king's "writ."

"But these oppressions ended with the distractions of "the baron wars, for towards the end of the reign of "Henry 3. there were particular laws made to regulate "the manner of distraining; and not to suffer the lords "to extend this remedy beyond the mischief it was first "introduced for; which was no more, than to empower "the lord by seizing the chattels to oblige the tenant to "perform the feudal services."

"These were to remain in the lord's hands as pledges "to compel the performance; and the detention was no "longer lawful, than the tenant refused to do the services "which were reserved by the feudal contract." (*h*)

Various statutory provisions were made to check the abuses of the power of distress. By the 10th chapter of Magna Charta it was forbidden, that any man should be distrained to do more service for a knight's fee or other freehold, than was really due: and the statute de districtione Scaccarii, 51 Hen. 3. declared, that distresses,

(*h*) Gilb. Distr. p. 2– 4.

whether made by the king, or a subject, should be reasonable; and confirms the rule of the ancient common law, that no man shall be distrained by his sheep, or beasts of the plough, whilst another sufficient distress can be had.

But the most important regulations respecting the power of distress, contained in any of our ancient statutes, seem to be those of the statute of Marlebridge; which inforces the former provision that a distress shall not be great and unreasonable; and enacts that persons making such distress shall be grievously amerced. (*i*)

The second chapter of the same statute (*k*) contains a confirmation of the common law in another respect; forbidding the lords to distrain for suits or services which were not due, or to take distresses out of their own fee or jurisdiction. This provision was at that time of great importance, for it frequently happened, that by means of unlawful distresses, the lords not only grievously oppressed their own tenants, but by the coercion of such distresses, compelled other persons, who were not their tenants, to do suit or service to them. After they had by these means obtained, what the law terms a seisin of such services, the party distrained upon was no longer at liberty to treat the distress as illegal, and make rescue of it; nor even to dispute the seisin thus tortiously gained, in an action of replevin, but was put to the more difficult and hazardous remedies of a *Contra formam Feoffamenti*, or *Ne injuste vexes*. (*l*)

The third chapter of the Statute of Marlebridge was made to repress one of the greatest evils, belonging to the right of distress, which prevailed in those days of violence and oppression. For the lords not only made distresses without any lawful cause, but frequently "kept "them with strong hand, and refused to permit even the "king's officers to make replevies of them:" by which means, a distress was in fact converted into a lawless

(*i*) Stat. Marleb. cap. 4.

(*k*) Confirmed by the Stat. of Westm. primer, cap. 16.

(*l*) Penruddock's case, 5 Rep. 100 b. Bevil's case, 4 Rep. 11 b.

seisure and confiscation. To redress this intolerable injustice, it was enacted by the third chapter of the Statute of Marlebridge, "That if any, of what estate soever he "be, will not suffer such distresses as he hath taken, to "be delivered by the king's officers, after the law and "custom of the realm; or will not suffer summons, at-"tachments, or executions of judgments given in the king's "court, to be done according to the law and custom of "the realm as is aforesaid, he shall be punished by fine, as "one that will not obey the law, and that according to the quantity of the offence."

But even this provision soon appeared to be in many cases a very ineffectual remedy; for the lords frequently drove the cattle distrained into their castles or fortresses, which were perfectly inaccessible to the king's officers, and whence it was therefore impossible to recover the distress. To such lengths do they seem to have carried this lawless violence, that in the third year of king Edward the First, it was found necessary to enact, by the 17th chapter of the statute of Westminster primer, that if such lords did not, upon being duly warned, make deliverance of the distress, the king should for such trespasses cause their castles or fortresses to be beaten down and demolished, and that the lord should restore to the person distrained upon, double the value of the things distrained, or damage sustained by the distress.

In these times, a distress was frequently resorted to, for the purpose of extorting the payment of an illegal fine; for the lords used to procure plaints to be made in their courts against strangers; whereon process issued, to which they were compelled to put in pledges, or be fined at the will of the lord: and even the king's officers or sheriffs, whose duty it was to make distresses by well-known bailiffs, were accustomed to make them by persons not known to be their bailiffs, to the intent, that the owner of the cattle might make rescous of them, for which the sheriff might extort money from him. (*m*) To remedy these abuses it was enacted by the 36th and 37th chapters

(*m*) 2 Instit. 445.

of the statute of Westminster the second, 13 Ed. I. that for such delinquencies, the lords should be fined to the king, and pay treble damages to the party grieved: and that the sheriffs should pay damages, and be otherwise grievously punished.

These various statutory provisions were however only made in affirmance of the common law, the remedies of which were found quite ineffectual. And as these statutes enacted penalties much more severe than those known to the common law, it is reasonable to suppose, that they contributed in some degree to check the evils to which they were applied. It is however probable, that their complete removal was ultimately produced, rather by the gradual improvement of social order, than by the immediate operation of laws, which were most frequently violated by those who enacted them.

There still however remained one great inconvenience in the conducting of the distress, which was not fully remedied before the reign of Ph. & Mary; I mean that of driving the cattle distrained to a distant pound, out of the county in which they were taken. This was indeed forbidden by the ancient statute of Marlebridge; but the remedy given by that statute being found ineffectual, it was enacted by the 1 & 2 Ph. & M. c. 12. that no distresses should be driven except to a pound overt within the shire, and not above three miles from the place of the taking: nor be impounded in several places, so as to compel the party to sue several replevins, on pain of forty shillings, and treble damages: and that no more than the sum of fourpence should be taken for impounding one distress, or where less had been used, then less, under a penalty of five pounds, besides the excess of the sum taken to the party grieved.

This seems to have been the last occasion on which the legislature found it necessary to interfere, for the protection of persons liable to a distress. From this period, its attention appears to have been confined to distresses for rent in particular, and therein to be directed to a very different object; namely, that of improving the remedy of distress in the hands of the landlord, so as to render it,

what it was indeed always intended to be, an equitable, but, at the same time, an effectual remedy for the recovery of his rent.

In order to ascertain to what extent this remedy has been improved and enlarged by the provisions of these modern statutes, it is necessary to observe, that at the common law, a distress for rent (and indeed every other distress except that for an amerciament) when made, was only a pledge to be retained in the hands of the distrainor; but could not be sold; and therefore was a very ineffectual remedy for the recovery of rent. For, as Mr. Justice Blackstone observes, "although such a distress put "the owner to inconvenience, and was therefore a punish-"ment to him; yet if he continued obstinate, and would "make no satisfaction, or payment, it was no remedy at all "to the distrainor." (*n*) To obviate this inconvenience, it is provided by the statute 2 Wm. & M. c. 5, that in all cases of distress for rent, upon any demise, lease or contract, if the tenant or owner do not, within five days after notice given to him of the cause of the distress, replevy the same with sufficient security, the distrainor, with the sheriff, under-sheriff or constable shall after appraisement thereof, by two sworn appraisers, sell the same towards satisfaction of the rent and charges, rendering the overplus, if any, to the owner of the goods distrained.

Among other rules of the common law relative to the subjects of a distress, there was one, that things belonging to the freehold were not distrainable, and another, that such things only were to be distrained, as could be restored in as good plight, as that in which they were taken. By the former of these rules, landlords were prevented from distraining growing crops on their tenant's land; and by the second, from taking corn after it had been cut: restrictions, which in fact deprived them of the best remedy for the recovery of their rents. To correct this inconvenience, they are by the stat. 11 Geo. 2. c. 19, empowered to distrain corn, grass, hops, fruits, roots, pulse, or other product of the land, and to cut and gather

(*n*) Comm. Vol. 3. p. 14.

them when ripe, to be disposed of by appraisement in satisfaction of the rent; and by the before mentioned statute of Wm. & Mary, corn in sheaves, or cocks, or loose in the straw, or hay in barns, ricks, or otherwise, may be distrained, as well as other chattels.

The statute 8 Anne, c. 14. enables persons having rent in arrear upon any lease for life, years, or at will, to distrain for such arrears within six months after the determination of the term, if made during the continuance of the landlord's title, and the possession of the tenant; which could not have been done at the common law. And the same statute contains a much more important provision, giving redress in a case, in which landlords were without remedy at the common law, namely, the clandestine and fraudulent removal of the tenant's goods from the premises demised, in order to avoid a distress; for by that statute, they are empowered to follow and distrain the goods, within five days after such removal. This provision has however been enlarged and rendered more effectual by the stat. 11 Geo. 2. c. 19, which enacts, that the landlord may follow and distrain the goods wherever they may be found within thirty days after such removal; and if they are locked up in any place, with the assistance of the peace officer of the parish, may break open the same, and take the goods; oath being first made, in case it is a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

By the 10th sect. of the same statute, the party distraining for rent, is enabled to impound or secure the goods distrained on any convenient part of the premises chargeable with the rent: which has obviated the inconvenience of an immediate removal of the distress, without which, the distrainor would have been liable at the common law, to be treated as a trespasser.

There was also another rule of the ancient common law on this subject, which perhaps tended more than any other to defeat the purposes of justice, and which indeed rendered distress a very unacceptable remedy. This was, that if the party distraining were guilty of any irregularity

in making or conducting the distress, he thereby became a trespasser *ab initio:* a rule deduced from an ancient maxim of the common law, much more remarkable for its rigour than its equity; namely, that whoever pursued a legal remedy in any other way than that prescribed by the law, should be considered as having purposed from the beginning, to commit a tortious act. This maxim when applied to a distress for rent, after the statute of William and Mary had authorized its sale in a particular manner therein prescribed, rendered such a distress a very difficult and hazardous proceeding. The evil was however at length remedied by the 19 sect. of the stat. 11 Geo. 2. c. 19. by which it is provided, that for any irregularity committed in making or conducting a distress for rent, the party guilty of it, shall not be deemed a trespasser *ab initio,* but that damages shall be recovered by the person aggrieved by such act, in proportion to the injury sustained.

Another great statutory provision respecting the remedy of distress for rent is contained in the 5th sect. of the stat. 4 Geo. 2. c. 28, which gives the like remedy by distress, and impounding and selling the same, in cases of rents seck, rents of assize, and chief rents, which had been answered and paid for three years, within the space of twenty years before the first day of that session of parliament, as for rent reserved on lease. A provision, the great importance of which will hereafter appear in our further inquiries into the nature of a distress for rent.

Such are the principal provisions which the legislature has thought fit to enact, for the purpose of improving the remedy of distress for the recovery of rent. And by these means, has a distress, which was formerly, in some cases, a very hazardous, and in others, a very ineffectual proceeding, been rendered one of the most equitable and efficient remedies known to the English law.

Of the causes of a Distress.

Although the recovery of rent in arrear is certainly the most usual cause of a distress, yet there are various other things, in respect of which a distress may be made.

Some of these are, in their origin, very analagous to that

CHAP. I.

Distress for Services, Suits, Reliefs, or Customs.

of rent; because arising out of the same relation of lord and tenant; as, First, a distress for suit at the lord's courts, or services due from the tenant to his lord, in respect of his land. Secondly, for a relief due upon the alienation of it. Thirdly, for a distress made by virtue of a custom established in some manors, or other particular districts, intitling the lord to require the performance of some duty, or the payment of some demand, to compel the satisfaction of which, the custom also enables the lord to make a distress on the goods of the party who is guilty of default.

The last of these distresses depends altogether on the particular custom upon which it arises, but the former for suit, services or reliefs, are recognized and regulated by the rules of the ancient common law, and are of common right: (*o*) being indeed that remedy for the subtraction of services, which was substituted for the more rigorous law of forfeiture under the feudal system.

Whilst the ancient military tenures subsisted in this country, these services due to the lord were as various as the tenures to which they belonged. There were tenures by knight's service, grand and petit serjeantry, escuage, homage, and other different kinds, on which particular services were due; for the subtraction of which, the lord was entitled to distrain. These services accordingly formed a very considerable part of the ancient laws of distress; but our inquiries concerning them are now greatly abridged, by the operation of the stat. 12 Car. 2. c. 24, which has completely abolished all the ancient military tenures, with their several incidents, and converted them into free and common socage. And therefore such services only as are incident to this latter tenure, can now be made the subject of a distress.

For fines and amerciaments.

A fourth cause for which a distress may be made, is for a fine imposed, or an amerciament made by a court leet. This court, which is of criminal jurisdiction, was originally in the hands of the king, but was afterwards, in some cases, granted to a subject being usually the lord of some honor or manor.(*p*) To this court, is incident the right of im-

(*o*) Co. Litt. 46. (*p*) 2 Instit. 70—74. 4 Inst. 261.

posing a fine for some offences, and of making by a jury an amerciament for others, committed by persons within its jurisdiction; (*q*) and for such fine or amerciament, a distress may be made of common right. (*r*)

For tolls and port duties.

A fifth cause of distress is that of tolls and port duties. These tolls are certain sums payable in respect of things sold in a public fair or market, within a particular franchise or manor; which tolls are of right due to the lord, to whom such fair or market belongs: and this being of itself a matter of public benefit, the law allows the lord or owner of the fair or market to distrain for such toll, due therein. Port duties are certain sums of money, due to the owners of a port or haven, for ships coming into, or otherwise using the same; and for which duties a distress may also be made.

For damage feasant.

A sixth cause "for which distresses may be taken, is "where a man finds beasts of a stranger wandering in his "grounds damage feasant, that is, doing him hurt or damage, "by treading down his grass, or the like; in which case, the "owner of the soil may distrain them, till satisfaction be "made him for the injury he has thereby sustained."(*s*)

For duties and penalties by particular statutes.

"Lastly, For several duties and penalties inflicted by "special acts of parliament, (as for assessments made by "commissioners of sewers, or for the relief of the poor) "remedy by distress and sale is given; for the particu-"lars of which," says Mr. Justice Blackstone, "we must "have recourse to the statutes of themselves, remarking "only, that such distresses are partly analogous to the "ancient distress at common law, as being repleviable "and the like, but more resembling the common law "process of execution, by seizing and selling the goods "of the debtor, under a writ of *fieri facias*."(*s*)

Having thus taken a general view of the origin and progress of the law of distresses, and enumerated the several causes for which they may be made, we may proceed to inquire more minutely into the first and principal of them—namely, that of a distress for rent.

(*q*) Griesley's Case, 8 Rep. 40. (*s*) Bl. Comm. 3. 7.
(*r*) Id. 41. a.

CHAPTER II.

Of a Distress for Rent, with relation to the several Kinds of Rent.

UNDER the ancient system of English tenures, when lands were generally held by military service, "the feudatories "being under frequent incapacities of cultivating and ma-"nuring their own lands, soon found it necessary to commit "part of them to inferior tenants, obliging them to such "returns in service, corn, cattle, or money, as might enable "the chief feudatories to attend their military duties with-"out distraction, which returns or reditus were the original "of rents." (*a*)

Rent-service.

When rents were thus created, it was natural, that the lords should be anxious to secure the payment of them, by the most ready and expeditious means: and therefore, to the principal kind of rent—namely, that of rent-service, the remedy of distress was considered as incident of common right.

Now rent-service was where the tenant held the land of his lord by fealty and certain rent, or by a certain rent together with homage, fealty, or other services. (*b*) It being called rent service, because it had some corporal service, as fealty at least, belonging to it. (*c*) And to rent-service, distress was incident, whether such rent were created by deed or parol,(*d*) provided that the reversion were in the landlord or lessor making the distress. (*e*)

Rent-charge.

The next species of rent known to the ancient common law, was a rent-charge; which was where a man being seized of lands, made a gift in tail by deed indented, or by deed-poll, the remainder over in fee; or a lease for life, with such remainder over; or a feoffment in fee; and by the same deed, reserved to himself and his heirs a

(*a*) Bl. Com. 2. 57.
(*b*) Litt. Sect. 213.
(*c*) Co. Litt. 142. a.
(*d*) Litt. Sect. 214.
(*e*) Litt. Sect. 215. Co. Litt. 143. a.

certain rent; and that if the rent should be unpaid, he and his heirs might distrain; or where being so seized, he granted a rent in fee or for life out of the lands, with a power to the grantee to distrain. (*f*) Rent so reserved or granted was a rent-charge, because the lands were charged with such distress by force of the deed only, and not of common right. (*g*)

Rent-seck.

The third species of rent, at the common law, was called a rent-seck, which was, where a man had granted a rent by deed, without a clause of distress; and for this rent, if in arrear, there was no distress at the common law. (*h*)

This was the most ancient species of rent-seck; being in effect a rent-charge, without the clause of distress: (*f*) but there was another species of rent-seck, which bore the same relation to a rent-service, that the former species did to a rent-charge. And this was, when the rent was separated from the reversion or services, as homage or fealty, by its union with which, it was originally a rent-service. This, as we shall hereafter see, might arise in various ways, but it was principally occasioned by the operation of the statute of *Quia emptores Terrarum*, 18 Edw. 1., which enacted, that where a tenant aliened to another his whole estate, the alienee should hold immediately of the lord, and not of the alienor: by which means, all reversion and services being divested out of the alienor, he could not distrain for a rent reserved upon his alienation, but it was in his hands a rent-seck. (*i*)

Out of what, rent may be reserved.

The remedy of distress seems to have been anciently considered as so essential to the nature of a rent, that if a man granted a mere right of distress in a particular manor to a certain amount, it operated as a good reservation of a rent. (*j*) On the other hand, it became a rule, that a rent could not be granted out of a piscary, common, franchise,

(*f*) If a man bindeth *his goods* and lands to the payment of a yearly rent, this will make a good rent-charge, although there be no express words of charge or to distrain. Co. Litt. 147. a.

(*g*) Litt. Sect. 217, 218. Jemott *v.* Cowley, 1 Saund. 113.

(*h*) Bl. Comm. 3. 42. Litt. Sect. 217, 218.

(*i*) See Sulliv. Lect. 10.

(*j*) Co. Litt. 147. a.

CHAP. II. or other incorporeal hereditaments; but only out of lands or tenements, to which the grantee might have recourse to distrain: (*k*) nor could the agreement of the parties alter the law in this respect.(*l*) Therefore a rent could not issue out of a rent, because there could not be an assize of it.(*m*) Nor out of a hundred, fair or advowson.(*l*) So likewise a payment reserved upon a lease of tithes, although sufficiently in the nature of a rent, to be suspended by eviction,(*o*) is not in truth a rent, because it issues out of an incorporeal hereditament, which cannot be distrained, nor put in view in an assize; (*p*) and therefore a lease of tithes for lives, by an ecclesiastical person, is void against the successor, because he would be without remedy for the payment reserved; but it is otherwise of a lease for years, for in such case the successor would have his remedy by action of debt; the lessee, although not liable to a distress, being bound by way of contract.(*q*) The produce of the land however is not incorporeal, and therefore a lease of the vesture or herbage reserving rent is good, and the lessor may distrain the cattle on the land. (*r*) And the king may reserve a rent out of any incorporeal hereditament, because he may, by his prerogative, distrain either for a rent-service or rent-charge, on all the lands of the lessee.(*s*) Where also a rent is reserved upon an entire demise of land and tithes, it seems that although it be entire as to render, yet as to the remedy it issues out of the land alone, and is distrainable accordingly.(*t*)

As a rent could not issue out of an incorporeal heredita-

(*k*) Co. Litt. 47. a. 144. a.

(*l*) Butt's Case, 7 Rep. 23. b.

(*m*) Bro. Abr. Assize, pl. 2.

(*o*) Dalston *v.* Reeve, Lord Raym. 77.

(*p*) Talentine *v.* Denton, Cro. Jac. 111. Rickman *v.* Garth, id. 173.

(*q*) Dean and Chapter of Windsor *v.* Gover, 2 Saund. 302. et not. Bally *v.* Wells, 3 Wils. 25. Co. Litt. 47. a. Vide Rex *v.* Ellis, 1 M. & S. 659.

(*r*) Co. Litt. 47 a.

(*s*) Lord Mountjoy's Case, 5 Rep. 4 Bro. Abr. Distresses, pl. 49.

(*t*) Doubitofte *v.* Curteene, Cro. Jac. 452, 453. Croom *v.* Talbot, Comb. 238. Newman *v.* Anderton, 2 New. Rep. 224.

ment, so, it was held that it could not be reserved out of a mere personal chattel: and that a covenant for payment of it would not bind the assignee. (*u*) Upon which ground it was much doubted, whether rent reserved upon a lease of land with stock upon it, or on the demise of a ready-furnished house or lodgings, could be distrained for, as the greater part of the rent must be considered as paid for the goods: but it is now determined that it can, because in contemplation of law, the whole rent issues out of the land or premises demised. (*x*)

If a man demise *White-Acre* and *Black-acre*, and have nothing in *White-acre*, the whole rent issueth out of *Black-acre*.(*y*)

Certainty of rent

As it is necessary that the rent should be reserved out of a corporeal hereditament; so it is essential to the nature of a rent or service, that it be certain in its quantity, extent and time of payment; or at least be capable of being reduced to such certainty. (*z*) And therefore a rent reserved after the rate of 18*l.* a-year was held bad for uncertainty in not specifying the nature of the rent, whether in money or in kind, nor the periods of its payment. (*a*) And for the like reason, at the ancient common law, the lord could not distrain upon the tenant in Frankalmoigne, because his duty was to perform divine services, uncertain both in time and number. (*b*) But it was in all cases sufficient if the rent could be reduced to a certainty; and therefore, a man might hold of his lord to shear all the sheep depasturing within his manor, because the number depasturing within the manor could always be ascertained. (*c*)

By what Deed, &c. to be reserved.

It is also essential to the nature of a rent, that it should be reserved by a sufficient grant or demise; that is, by some grant or demise passing an estate to the tenant, or enlarging

(*u*) Spencer's case, 5 Rep. 17.

(*x*) Newman *v.* Anderton, 2 New Rep. 224.

(*y*) Croom *v.* Talbot, Comb. 238.

(*z*) Co. Lit. 96 a.

(*a*) Parker *v.* Harris, 4 Mod. 78. S. C. 1 Salk. 262. If however the rent had been ascertained, a general reservation would have made it payable yearly. Cole *v.* Sury, Latch. 264.

(*b*) Litt. Sect. 136.

(*c*) Co. Litt. 96 a.

CHAP. II.

an estate already in him.(*d*) For although a reservation of rent may be made, either by an indenture or deed-poll, provided an estate pass by it, to the tenant; yet, any reservation in a deed, by which no estate passes is void: although a right, without an estate, may pass by the same deed. (*f*) And if the deed operate by any extinguishment or surrender of the grantor's estate; in that case the reservation is void, because the reversion is gone; (*f*) although a mere grant of the reversion itself to another person, will pass the rent as being incident to it; (*g*) whether such rent issue out of freehold or copyhold land. (*h*)

An agreement for a future lease at a rent certain is not a sufficient reservation of rent, and will not constitute a demise, and when a party is let into possession under such an agreement, the lessor cannot distrain, but must resort to his action for use and occupation. (*i*)

By the common law, a rent could not be reserved upon a bargain and sale; because only a use, but no estate, in the land passed by such deed, before the statute of uses. (*j*) But now, by that statute, the possession being executed to the use, the bargainor may distrain, for the rent. (*k*)

To whom to be reserved.

It is also a maxim of the common law, in order to prevent the maintenance of suits, that rent cannot be reserved to a stranger; but only to the feoffor, donor, lessor, or his heirs; for they have only a privity of estate. (*l*) This rule does not however extend to a lease by deed indented, made by two joint-tenants reserving rent to one of them, for he has a privity of contract and estate. (*l*) Nor does it extend to the king, who, in general, may reserve a rent to a stranger; but, where such reservation was made to

(*d*) Bac. Abr. Rent C.

(*f*) Bac. Abr. Rent. C.

(*g*) Litt. Sect. 220.

(*h*) Swinnerton *v.* Miller, Hob. 177. Where the deed is sufficient to create a rent, a mere covenant to pay rent, especially if made to the lessor and his heirs, will be a good reservation of rent, without a reddendum, or other reservation, being contained in the deed. Drake *v.* Munday, Cro. Car. 207.

(*i*) Hegan *v.* Johnson, 2 Taunt. 148. Dunk *v.* Hunter, 5 B. & A. 322.

(*j*) 27 H. 8. c. 10.

(*k*) Co. Litt. 144. a.

(*l*) Litt. Sect. 346. Co. Litt. 214.

an officer of the crown removable at pleasure, it was held to be void. (*o*)

To be reserved conformably to the estate.

Rent should also so be reserved conformably to the nature of the estate: for in some cases, if the reservation be bad, it will destroy the rent. As where a lease for years was made by a tenant in fee simple, and his son and heir apparent, to commence after the death of the father, reserving the rent to the son by name, but not reserving it to the heir or heirs of the father: it was held that the son could not take the rent at all, for it was only as heir of his father that he could take it; but neither to the heir or heirs of the father was it reserved. (*p*) An improper reservation will not however, in general, destroy the rent: for if lessee for hundred years should underlet for fifty years, reserving a rent to him and his heirs, during the term; this rent, it seems, would go to the executor. (*q*) Or if a rent-charge for years be granted to a man and his heirs it will go to his executors. (*r*) So if tenant in tail make a lease and reserve the rent generally to his heirs, it will go to his heirs in tail. (*q*) Or if a rent-charge be granted out of gavelkind lands, to a man and his heirs, it will descend according to the nature of the land. (*s*) So in the grant of a rent-charge the rent will be held to ensue the nature of the grantor's estate at the time of the grant. Thus if a rent be granted by tenant for life and confirmed by him in remainder in fee being within age, the rent issues out of the estate for life only, and the grant as to the remainder-man is void, and even if the tenant for life purchase the remainder or reversion and die, it shall not bind the inheritance. (*t*) And where there is no specification of the persons to whom it is reserved, the rent will enure according to the nature of the estate: for the law, as it has been said by Lord Hale,

(*o*) Anonymous, Ld. Raym. 36.

(*p*) Oates *v.* Frith, Hob. Rep. 130.

(*q*) Sacheverell *v.* Frogate, 1 Vent. 162.

(*r*) Darrell *v.* Wilson, Cro. Eliz. 644.

(*s*) Randall *v.* Jenkins, 1 Mod. Rep. 110. S. C. 2 Lev. 87.

(*t*) Holt *v.* Sambach, Cro. Car. 103.

"uses all industry imaginable to conform the reservation to "the estate." (*v*) But, where there is a specific reservation of rent to the lessor, without naming any other persons, as heirs, executors, &c. to whom it shall be paid; the rent will be confined to the person to whom it is so reserved, and will cease at his death; (*x*) unless it be reserved payable during the term, which will preserve the rent until the end of the term, and the law will distribute it according to the nature of the estate. (*v*)

Incident to the reversion and services.

It has been already observed, that the rent was considered as incident to the reversion, although not so inseparably incident to it, as fealty, or other services: for these could not be reserved, if the remainder or reversion were granted over. (*y*) But still, the separation of the rent from the reversion, had, in many cases, the effect of reducing a rent-service, to a rent-seck. Thus, if a man granted to another a rent-service by deed, reserving to himself the reversion, and the tenant attorned to the grantee; such rent was, in the hands of the grantee, only a rent-seck. (*a*) And the same effect followed upon a separation of the rent from the fealty or other services. As where the tenant held by fealty and certain rent, and the lord reserving to himself the fealty, granted the rent to another with a clause of distress, and the tenant attorned, this also became a rent-seck; because, although the rent might be separated from the fealty, yet the distress could not; but necessarily followed the seigniory in the hands of the lord who had reserved to himself the fealty: for otherwise, the tenant would have been liable to two distresses, which cannot happen but by act of law. (*b*) And therefore when the rent had once become a rent-seck, it seems, that the lord could not afterwards grant it with a clause of distress. (*c*) And where the distress was an inseparable incident, as it was to fealty, a

(*v*) Sacheverell *v.* Frogate, 1 Vent. 162.

(*x*) Cother *v.* Merrick, Hardr. 95.

(*y*) Co. Litt. 143 a. 151 b.

(*a*) Litt. Sect. 228.

(*b*) Litt. Sect. 225. Co. Litt. 150 b. 153 a. 164 b.

(*c*) Litt. Sect. 227.

release of the distress reserving the fealty would have been void. (*d*)

There seem to have been, however, some cases, in which a rent-service might be so far changed, as to lose its principal qualities, without being reduced to a mere rent-seck. As when there were lord paramount, mesne and tenant, and by the act of the lord and tenant, to which the mesne was no party, the rent-service due to him from the tenant, was destroyed as a rent-service, by coming into the hands of the lord: in this case the lord could not hold of the mesne, yet the rent was considered as still due to the mesne, not strictly as a rent-service, but yet as a rent distrainable of common right. (*e*)

So by construction of law, a rent is sometimes deemed to be a rent-charge, without an express clause of distress: as in the case of coparceners, where upon partition a rent is reserved payable by one coparcener to another, for equality of partition: this rent may be distraiued for of common right, without a reservation of distress. (*f*)

Seisin of the rent.

It was not however sufficient, at the common law, to support a distress for rent, that such rent should be properly reserved or granted. It was also necessary, that the party distraining should have a seisin of the rent; without which, there was no privity between him and the tenant. And therefore before the stat. 4 Anne, c. 16., had rendered attornment in future, unnecessary, it was requisite upon the grant of a rent-charge or rent-service, that the tenant should attorn to the grantee, in order to give him a seisin in law of the rent, without which the grantee could not distrain. (*g*) And even this seisin in law was not sufficient to support an assize, or other real action for the rent; for which actual seisin by receipt of a part of the rent was required. (*h*) This latter seisin was not however necessary for a distress, because, except in a very few cases,

(*d*) Co. Litt. 151 b.

(*e*) Litt. Sect. 231, 232. Co. Litt. 153 a. and Harg. note (1) ibid. Bevil's Case, 4 Rep. 9 b. and Fawkner *v.* Bellingham. Sir W. Jo. Rep. 234. et seq.

(*f*) Litt. Sect. 252, 253, and Harg. note (1) on Co. Litt. 153 a.

(*g*) Co. Litt. 309, 311.

(*h*) Litt. Sect. 235.

CHAP. II.

(such as a seisin of incroachment tortiously gained by coercion of distress;) the tenant was not permitted to dispute the actual seisin of his lord, in a replevin. (*i*) But since the statute 4 Anne, c. 16., the doctrine of seisin with relation to a distress for rent, has become nearly obsolete; although some cases still exist in which it may come in question. As in a distress for an ancient rent-charge created before the statute of Anne; for such rent-charge, not being within the provisions of that statute, (*j*) and being excluded in common with all other rent-charges from the enactments of 11 Geo. 2. c. 19, (*k*) remains under the operation of the common law.

There were some other species of ancient rents besides those which have been already considered; such as fee farms, rents of assize, and chief rents: but with relation to the remedy of distress, all rents of whatever description are reducible to one or other of the three great divisions of rent-service, rent-charge, or rent-seck. (*l*) Thus, a fee farm rent, if created before the statute of *Quia emptores Terrarum*, (*m*) seems to be a rent-service with fealty annexed to it: (*n*) if created after that statute, (which considered strictly as a fee farm rent, it cannot be (*o*)) it seems to be in the nature of a rent-charge, if reserved with a clause of distress; and a rent-seck, if reserved without it: (*p*) so that if such a rent be of modern creation, distress is not incident to it, otherwise than as a rent-seck distrainable within the stat. 4 Geo. 2. c. 28. (*p*)

Fee farm rents.

Rents of Assize, &c.

Rents of assize are defined, by Lord Coke, to have been certain rents of the freeholders and ancient copyholders; and so called, because they were assised and certain, and thereby distinguished from the *reditus mobiles*, or farm rents

(*i*) Bevil's Case, 4 Rep. 9 a. 11 b.

(*j*) Long *v.* Buckridge, 1 Stran. 106.

(*k*) Lindon *v.* Collins, Willes 429. Bulpit *v.* Clarke, 1 N. R. 56.

(*l*) Bl. Comm. V. 2. p. 42.

(*m*) 18 Edw. 1.

(*n*) Spelm. Gloss voce Feodi Firmà. Terms de la Ley voce Fee Farm.

(*o*) Fearne, p. 529.

(*p*) Harg. note (5) on Co. Litt. 144 a. Bradbury *v.* Wright. Doug. 627. et not.

for life, years, or at will, which were variable and uncertain. (*r*) Chief rents seem to have been only another name given to the rents paid by the ancient freeholders. (*s*) And both the assize and chief rents were originally of the nature of rent-service.

The last species of rent which remains to be mentioned, is that of copyhold rents, paid by the tenants of a manor, to the lord, for their tenements holden by copy of court roll. As fealty was always incident to this species of tenure, these rents are in their very nature rent-services, and as such, have always been considered, to be distrainable of common right. (*t*)

These several kinds of rent, thus differed at the common law, with respect to the remedy of distress, as they belonged to one or other of the three kinds, of rent-service, rent-charge, and rent-seck: and so they in effect continued, until the reign of king George the Second. For although some statutory provisions had been made, enabling particular persons to distrain for rent, who could not before distrain at the common law; (*u*) still, the great distinctions between the different kinds of rent, with respect to the power of distress, remained, until they were finally and completely abolished by the stat. 4 Geo. 2. c. 28. s. 5, by which it was enacted; that there should be the like remedy by distress in cases of rents-seck, rents of assize, and chief rents, which had been duly paid for the space of three years, within twenty years, before the first day of the session in which the act was passed, or which should be thereafter created, as in case of rent reserved upon lease. And distress therefore now belongs equally to every species of rent, whether rent-service, rent-charge, rent-seck, rent of assize, or chief rent; and whether reserved by deed or parol: provided in the case of the three latter species of rents, that they have been created since that statute, or that they have been paid during the time, and within the period therein prescribed.

(*r*) 2 Instit. 19.

(*s*) Bl. Comm. 2 V. 43.

(*t*) Laugher *v.* Humphrey, Cro. Eliz. 524.

(*u*) As the Stat. of 32 Hen. 8. c. 37.

CHAPTER III.

Of the Persons who are entitled, in respect of their Estate or Interest, to distrain for Rent.

In considering the several kinds of rent which were recognized by the common law, I have already had occasion to advert to the relation, which subsisted between the nature of the rent, and the reversion in the premises out of which it was granted or reserved; and also, between the rent, and the other services, with which it might be connected. And we have seen, that at the common law, to have a distress for a rent, as of common right, it was in the first place necessary, that the lord or lessor making the distress, should have the reversion in himself. Secondly, that the rent should be reserved out of a corporeal hereditament. Thirdly, that it should be certain in quantity and duration. Fourthly, that it should be reserved by a sufficient deed or conveyance. And, lastly, that it should be properly reserved, in respect of the persons to whom it is payable. These several requisites may therefore be regarded as essential to the very nature of a rent, as it stood at the common law.

Of the apportionment, suspension, and extinction of rents.

From the preceding inquiry it also appears, that rent is regarded as of a two-fold nature. First, as something issuing out of the land in respect of which it is granted or reserved: and, secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure. From this two-fold consideration, have arisen the doctrines, of the apportionment, suspension, and extinction of rents. For, considering the rent as something issuing out of the land, it became necessary to determine, whether the rent should be taken as an entire thing incapable of division, and so in-

separably attached to the whole land out of which it issued, and the grantor's estate therein, that, by the severance of any part of the land from the remainder, or by the grantor's departing with any portion of his estate in the land, the rent should be wholly destroyed: or whether, notwithstanding its general entirety, it should be considered, in some cases, as only partially extinguished; and in others, as dividing itself into different portions following respectively the different parts of the land, or of the estate therein, as the same might be changed by the acts of the party, or the law. The latter of these principles was adopted, and that adoption gave birth to the doctrine of the apportionment of rents.

On the other hand, considering the rent as something belonging essentially to the relation of landlord and tenant, and a fruit of the tenure; it was obvious, that those things which were capable of affecting that relation of tenure, should be deemed to affect the rent itself. For, as the tenant owed allegiance and fidelity to his lord, so did the lord owe protection to his tenant; and therefore, if the lord did any act which impeached or destroyed the estate of his tenant, it was fit, that he should lose the rent which was due from the tenant only in consideration of being permitted to enjoy the lands demised. This gave rise to the doctrine of the suspension or extinction of rents.

When the rent was held to be thus capable of extinction by the acts of the lord, it of course became a rule that if the lord evicted or ousted the tenant of the land, the whole rent should cease. But as the tortious acts of the lord might be either of a general nature extending to every part of the tenant's land; or partial, affecting only some portion of it; and as in their duration, they might in some cases be temporary, and in others, commensurate with the remainder of the tenant's term: it became necessary to consider, how far a rent could be partially suspended, or partially extinguished; and this of course gave rise to various distinctions, in respect of the different acts, by which such suspension or extinction might be effected.

It was not however, only by a tortious act of the lord, that

CHAP. III.

the existence of the rent might be destroyed; for considering it as arising out of a tenure, it is evident, that a rent cannot exist, where there cannot be a real or implied tenancy. And as a man cannot hold land of himself, it of course follows, that where after the creation of a rent, the land out of which it issues, comes into the possession of him, to whom the rent is reserved, by such unity of possession, the rent is in contemplation of law extinguished.—And therefore, if he who has the reversion purchase the tenant's term in the land, the rent becomes extinct. If he purchase the whole estate in part of the land, the rent will in such case be apportioned. But if he purchase part of the estate in the land, or take an under lease of the land itself, this is a suspension, but not an extinguishment; for when the under lease expires, the rent revives. (*a*)

Rents being thus generally capable of apportionment, suspension, and extinction, and the remedy of distress in all cases depending on the nature and existence of the rent, it is necessary to inquire, how far the doctrine of apportionment, suspension, and extinction, applies to the different kinds of rent, which may be made the subjects of a distress. (*b*)

Of the apportionment, &c. of a rent-service.

Rent-service was capable of apportionment even at the common law, before the statute of *quiâ emptores terrarum*. (*c*) But by the second chapter of that statute, it was expressly provided, that when the tenant sold a part of the lands which he held of his lord, the feoffee should hold it of the lord, charged with the services, for so much as appertained to the parcel sold. There were however, various kinds of rent-service not within that statute, which were apportionable at the common law, (*c*) either by the act of law, or the act of the party. As if the lessor recovered part of the land in an action of waste, or for a forfeiture, there by the act of law the rent was apportioned: (*c*) so

(*a*) Hodgkins *v.* Thornborough, Pollexf. 142.

(*b*) See a most elaborate note on the doctrine of apportionment of rent, both at law and in equity. *Ex parte* Smith, 1 Swans. Rep. 337. (a)

(*c*) 18 Edw. 1. Co. Litt. 148 a.

likewise if the lessor devised a part of the reversion; for such division is also by the act of the law, *viz.* the Statute of Wills (*f*) And although it has been said, that there was no apportionment of rent at common law, by the act of the party; (*g*) yet it was clearly otherwise; for if a man made a lease for life or years, reserving a rent, and afterwards accepted a surrender of part of the land from the lessee, in that case the rent was apportioned: so, if the lessor granted part of the reversion to a stranger, the rent was apportioned, as being incident to the reversion. (*h*) So likewise if the reversion of one moiety of the land was was granted to *A.*, and the reversion of the other moiety to *B.* the rent was apportioned. (*i*) If also the tenant or lessee upon the performance of a condition acquired the reversion in part of the land, in that case also there was an apportionment of the rent. (*k*)

But in the apportionment of rents, there is a difference between the grant of a rent, and the reservation of a rent. For if a man be seised of two acres of land, of one in fee-simple, and of the other in tail, and by deed grant a rent out of both, in fee, in tail, or for life, and die, the land intailed is discharged, and the land in fee-simple remains charged with the whole rent: which is taking it most strongly against the grantor. But if he make a gift in tail, or a lease for life, or years of both acres, reserving a rent, and die; and the issue in tail avoid the gift or lease, the rent will be apportioned. For the rent being reserved out of the whole land, it is reasonable that when there is an eviction as to a part of the land, by a title paramount, the donee or les-

(*f*) Ewer *v.* Moyle, Cro. Eliz. 771. Co. Litt. 148 a.

(*g*) See Vin. Abr. Apport. *A*, 15

(*h*) Co. Litt. 148 a.

(*i*) Swinnerton *v.* Miller, Hob. 177.

(*k*) Co. Litt. 148 b. In cases of apportionment of rent, the quantum to be paid by the tenant to each of the several persons, amongst whom the apportionment is to be made, must be settled by a jury, unless agreed upon by all parties; and any apportionment made between the claimants without the concurrence of the tenant will not be binding upon him, nor transfer to the apportionee the rights and remedies which he would acquire under a legal apportionment. Bliss *v.* Collins, 5 B. & A. 876.

see should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land. (*l*)

If a man who has a rent-service purchase part of the land out of which the rent issues, this does not extinguish the whole rent, but only a parcel of it: although it is otherwise in the case of a rent-charge. (*m*) For here, the rent-service may be apportioned according to the value of the land, unless it be of a nature incapable of apportionment, as to render yearly a horse or a spear. (*n*) But this, says Lord Coke, is intended of a purchasse in fee-simple, for if there be lord and tenant of forty acres of land, by fealty and twenty shillings rent; and the tenant make a gift in tail, or a lease for life or years of parcel thereof to the lord, in this case, the rent shall not be apportioned for any part, but shall be suspended for the whole. For a rent-service may be extinct for a part, and apportioned for the rest; but it cannot be suspended in part, by the act of the party, and in esse for the other part. (*o*) This latter rule must however be understood with some limitation; for it certainly does not extend to those acts of the party, which are made for the assertion of a legal right; nor where the lord takes an interest or profit in the land not inconsistent with the tenant's estate: as where by the licence and consent of the tenant, the lord enters into and enjoys a part of the land. (*p*) But if the lessor tortiously enter upon the lessee for life or years, and put out or disseize him of part of the land, there, the rent is suspended for the whole, and shall not be apportioned for any part; for this, says Lord Hale, would be for a man to apportion his own wrong: (*q*) but where he enters lawfully upon a surrender or forfeiture, there, the rent is suspended or extinguished only for that part, and subsists by apportionment for the remainder. (*r*)

(*l*) Co. Litt. 148 b. Doe d. Vaughan *v.* Meyler, 2 M & S. 276. *et vide* Stevenson *v.* Lambard, 2 East, 579.

(*m*) V. post p. 33.

(*n*) Litt. Sect. 222.

(*o*) Co. Litt. 148 b.

(*p*) Hodgkins *v.* Robson, 1 Vent. 277.

(*q*) Ibid. and see Dorrell *v.* Andrews, Hob. 190.

(*r*) Co. Litt. 148 b.

By act of law however, a rent-service might in many cases be suspended in part, and in esse for part. As when the guardian in chivalry entered into the land of his Ward within age, the seigniory was suspended; but if the wife of the tenant were endowed of a third part of the tenancy, it was held that he should pay to the lord a third part of the rent. (*s*)

Where the lord tortiously enters upon the whole land demised, and evicts the tenant therefrom, it seems that the rent is suspended during the eviction, but not extinguished; and that if during eviction the lord make a feoffment of the land, and then the tenant re-enters, the rent will revive, and the feoffee may distrain for it, although he cannot maintain debt for the rent for want of privity of contract. And a feoffment made by the lessor destroys a rent, unless the rent be in esse at the time of the feoffment; so that if a lease be made for forty years, reserving rent at the end of twenty years, a feoffment made by the lessor, during the first twenty years of the term, will not destroy the rent. (*t*)

As a rent-service issues out of the reversion, the destruction of the reversion will in general destroy the rent; but this rule seems not to extend to acts to which the owner of the rent is not party, and therefore it has been held, that if tenant in tail rendering rent discontinue, the rent is still preserved to the donor. So if he suffer a recovery, whereby the donor's reversion is destroyed, the rent will still continue, although it would be otherwise if the rent had been granted out of a remainder never executed in possession, or if the donor's estate had been defeated by a recovery, by title had against him. (*u*)

Rent in arrear is not extinguished by taking a promissory note for it, unless laches are committed on the note; nor even by taking a bond for it, for the accepting of a security of an inferior or equal degree is no extinguishment of a

(*s*) Co. Litt. 148 b.

(*t*) Dyer 31 a. 210.

(*u*) White *v.* Gerish, Cro. Eliz 727, 768, 792. S. C. 2 Anders. 170. Noy. 9. *Sed vide* 3 Leon. 261, 349, *et* Burwell *v.* Harwell, Cro. Car. 598.

CHAP. III.

debt; but a judgment obtained upon the bond is an extinguishment of the rent.(*x*)

Distress by the lord for a rent-service.

The foregoing principles, regulating the doctrine of apportionment, suspension, and extinction, with respect to a rent-service, united with the general rules, which govern the reservation of rents, determine in what cases the lord is entitled to distrain for a rent-service, and also, the quantity of rent which he may thereby recover. For such a distress being of common right, where the rent is properly reserved, the remedy of distress in the hands of the lord follows it of course to the extent of such reservation. It is only therefore necessary, to make a few remarks on the right of the lord to distrain for a rent-service, when he takes by escheat.

Lord by escheat.

In general, the lord is not entitled to the escheat of land or rent, unless *pro defectu tenentis.*(*y*) So that if the heirship fail without destroying the tenancy to the lord, he will not take by escheat, and therefore if his tenant be grantee of a rent-charge in fee-simple, and die without heirs, the rent will not escheat, but be extinguished; (*z*) and no one being entitled to it, the tenant will hold the land discharged of the rent. If the tenant have a reversion in the lands holden, such reversion is a part of his tenancy, and will escheat to the lord.(*a*) And, therefore, if the tenant lease for life, rendering rent to himself and his heirs, and he die without heirs, so that the reversion escheat to the lord, and afterwards the rent be in arrear, the lord may distrain; (*b*) for here the rent is incident to the reversion, and goes with the reversion into the hands of the lord.(*c*)

The lord taking by escheat, is considered as taking by a title paramount that of his tenant; and therefore, when attornment would otherwise have been necessary, it was held, that the lord distraining for a rent reserved upon land, which afterwards came to him by escheat, might make such

(*x*) Bull. N. P. 182.

(*y*) Attorney-General *v.* Sands, Hardr. 494.

(*z*) Id. 496.

(*a*) Vin. Abr. Escheat. C.

(*b*) Litt. Sect. 348.

(*c*) Co. Litt 215 b.

distress, without any attornment by him from whom the rent was due.(*d*)

At the common law, when the lord distrained for a rent-service, by title of escheat or otherwise, such distress was made in respect of his seigniory. And upon this principle it was held, that pending a plea to try the seigniory of the lord, he could not make a distress for the tenant's rent. So that, if the lord distrained for rent, and the tenant replevied, and to the avowry of the lord pleaded *hors de son fee*, and pending that plea, the lord distrained for rent subsequently accrued; it was held, that the tenant was entitled to his writ of *recaption;* because it was fit he should not be again distrained, until the seigniory of the lord had been tried in the first plea: but if he had pleaded, *riens arrere*, or any other plea admitting the tenure, the lord would have been entitled to make a second distress.(*e*)

Distress for a rent-charge.

To a rent-charge, the remedy of distress, as has been already observed, was not incident of common right, but only by virtue of the special clause of distress.(*f*) And where a man by deed granted to another a rent-charge, unless the person of the grantor were specially exempted, by the same, or another deed, the grantee might elect, either to sue a writ of annuity against the grantor, or distrain for the rent.(*g*) In the grant of a rent-charge, it is held, that the rent may issue out of one parcel of land, and the distress be reserved in another: and in this case, whether the lands lie within the same or different countries, it should seem, that the distress can be taken only on the land, in which it is reserved.(*h*) But although the distress may be thus separated from the rent as to the locality of the

(*d*) Mallory's Case, 5 Rep. 113. Vide Burr. Rep. 1291.

(*e*) Bro. Distr. pl. 14. F. N. B. 71.

(*f*) Ante, p. 23.

(*g*) Litt. Sect. 219, 220. Co. Litt. 145 a. 146 b. If a rent-charge be granted, with a penalty in case of non-payment, it should seem that a distress may be made for both, per Skeene Just. 11 Hen. 4. 85. Sed q. Danv. Abr. Dist. G.

(*h*) Litt. Sect. 221. Co. Litt. 147.

CHAP. III.

land, it must still ensue the nature of the estate therein.(*l*) And, therefore, if there be a freehold estate in the rent, as if granted for life or in tail, and the distress be only reserved for a term of years, the reservation is void, and the whole rent is seck.(*m*) But if a rent be granted to two persons and their heirs, with a clause of distress to only one of them and his heirs, and he die, still the survivor may distrain, for the distress is appurtenant to the estate in the rent.(*m*) But if the grant be to one and his heirs, with a power for him to distrain during his life, his heirs cannot distrain.(*m*) Upon the same principle it has been held, that the grantee of a rent-charge in fee who had levied a fine of it, to the use of himself and wife in tail, had so far the seisin of the same estate in the rent, as to be capable of distraining for the arrears due before the fine levied.(*n*) So the *cestuy que use* of a rent-charge, since the statute of uses, is entitled to distrain.(*o*) So where a rent-charge(*p*) is granted to one and his executors, the executors may distrain. But in all cases, the privity of estate must remain; and, therefore, if one seised in fee of a rent, grant it to another in fee, he cannot afterwards distrain for the arrears; because he has by his own act destroyed all privity of estate between himself and the tenant. (*q*) Upon a similar principle it seems to be thought, that if a rent-charge be granted to a man in consideration of his performing the duties of an office, and the rent be in arrear, he cannot distrain for such arrears after quitting his office, although he might recover them in an action of debt.(*r*)

A rent-charge may be granted if the freehold be in the grantor, and be distrained for immediately, notwithstanding an outstanding term of years; but if the grantor have only a reversion expectant on an estate of freehold in another, although he may, pending such outstanding estate, grant a

(*l*) Ante, page 19.

(*m*) Co. Litt. 147 b.

(*n*) Witherhead *v.* Harrison, Sir Tho. Jo. 2.

(*o*) Cooke v. Herle, 2 Mod. 128.

(*p*) Hassell d. Hodgson, *v.* Gowthwaite, Willes, 500.

(*q*) Ognel's case, 4 Rep. 49. Dixon *v.* Harrison, Vaugh. 40.

(*r*) Clerk *v.* Gurnell, 1 Bul. 168. Dyer, 270, pl. 23.

rent-charge, it will not become due until the prior estate be determined, and the reversion vest in possession.(*t*)

Apportionment of a rent-charge.

The right of distress created upon the grant of a rent-charge, may however, like that for a rent-service, be affected by the apportionment, suspension, or extinction of the rent itself; although in general, a rent-charge could not be apportioned like a rent-service, because it was not aided by the statute of *Quia emptores terrarum.* So that, if a man having a rent-charge issuing out of land, purchase any parcel of the land, all the rent is extinct. (*u*) For a rent-charge being against common right, is construed strictly, and in general, held not to be apportionable by the act of the party. And therefore, upon such a purchase, it is necessary to have a new clause of distress from the grantor of the rent, which is in effect the creation of a new rent. But although the grantee cannot sever any part of the land from the rent, without extinguishing the whole rent, yet he may by release extinguish a part of the rent itself.(*x*)

A rent-charge may in various cases be apportioned by act of law, where it cannot be apportioned by the act of the party. As, where a man had a rent-charge, and his father purchased part of the tenements charged in fee, and died; and the part so purchased descended to the son who had the rent-charge; now this charge was apportioned according to the value of the land, as if it had been rent-service; because it came to the son by act of law. (*y*) So, if the father be grantee of a rent, and the son purchase part of the land charged, and by the death of the father the rent descend to the son, such rent shall be apportioned. So, if the grantee devise a rent-charge to two or more the rent shall be apportioned. (*z*) And so it is, if the grantee assign the rent to the tenant of the land and a stranger jointly, the rent is extinct but for a moiety. (*a*)

In some cases, where by the act of the party, a rent-

(*t*) Myles *v.* Willoughby, Cro. Eliz. 547. Vide Sir Wm. Jones, 456.

(*u*) Litt. Sect. 222.

(*x*) Co. Litt. 148 a.

(*y*) Litt. sect. 224.

(*z*) Colborne *v.* Wright, 2 Lev. 239.

(*a*) Co. Litt. 149 b.

charge would be extinguished, yet, by the act of law, it will be saved not only from extinction, but be preserved entire from apportionment. As when a man grants a rent-charge out of two acres, and afterwards the grantee of the rent recovers one of the acres against the grantor by a title paramount, the whole rent will issue out of the other acre; but if it were a covinous recovery by a feigned title, the whole rent would be extinct, for then he would claim under the grantor. (z) And yet in some cases, a rent-charge is not wholly extinct, even where the grantee does claim under the grantor. As if *B.* lease one acre to *A.* for life, and *A.* being seised of another acre in fee, grants a rent-charge to *B.* out of both acres, and commits waste in the acre which he holds for life, so that *B.* recovers from him that acre for the waste committed; the whole rent is not extinct, but shall be apportioned, although *B.* claims this acre under *A.* It being so held, in order to prevent the lessee from gaining the advantage of extinguishing rent by his own waste and forfeiture. (z) And upon the same principle it is held, that if tenant in tail grant a rent, and afterwards suffer a common recovery the rent which was *in esse*, shall not be destroyed by this recovery. (a)

In general, neither a rent-service nor a rent-charge can be partially suspended by the act of the party; but by the act of law, they may be suspended in part, and be *in esse* for the remainder. Thus where the tenant gave a part of the tenancy to the father of the lord in tail, and the father died and it descended to the lord; in this case, by the act of law the seigniory was suspended in part, and *in esse* for another part: by which means the rent-service, as incident to the seigniory, was in like manner suspended. And in the case of a rent-charge the law is the same. (z)

It is however perfectly clear, that by act of the party, the whole of a rent-charge may be for a time suspended, and afterwards revive. Thus, where a man seised of a rent-charge for life, took a lease of the land for five hundred

(z) Co. Litt. 148 b. S. V. Harg. note 147. ibid.

(a) White *v.* West, Cro. Eliz. 793.

years, and entered thereon; and afterwards, before the rent-charge was in arrear, surrendered the term to the lessor, and then distrained for the rent: it was held, that by such surrender, the lease was absolutely gone and extinguished, as between the parties, and therefore that the rent revived: although it would have been otherwise as against those, who were not parties to the surrender. (*d*)

A rent-charge may be extinguished, not only by the act of the party, but by the act of God; for if the grantee of a rent charge in fee die without heirs, the tenant will hold the land discharged of the rent, for it does not belong to any one by escheat. (*e*)

Where a rent-charge was granted *pro concilio impendendo* and the grantee was attainted of treason and imprisoned for the space of a year, it was held that neither was the rent forfeited to the Crown, nor the grantor discharged from it. (*f*)

Seisin of a rent-charge, when necessary.

At the common law, the grantee of a rent-charge could have no remedy for it by distress, or otherwise, until he had gained a seisin of the rent, sufficient to create a privity of estate between himself and the tenant: for which purpose, as I have already observed, attornment was formerly in all cases necessary, and is still requisite to be shewn, in cases of ancient rents, created before the statute 4 Anne, c. 16. (*g*) With respect to attornment on a rent-charge, it was held, that where persons seised of a rent-charge, by granting it over with attornment of the tenant, totally departed with their estate, and afterwards retook, either their former, or a different estate in the rent, a new attornment was necessary; the former privity being absolutely destroyed. But, where attornment was once made to a man's estate in the rent, no new attornment was necessary, although his estate became afterwards enlarged or diminished. (*h*) Nor was it requisite to an estate executed by the statute of uses. (*i*)

(*d*) Peto *v.* Pemberton, Cro. Car. 101.

(*e*) Attorney-General *v.* Sands, Hardr. 496.

(*f*) Oliver *v.* Emsonne, Dyer, 2.

(*g*) See ante, p. 21.

(*h*) Co. Litt. 309 b. Long *v.* Buckeridge, Stra. 108.

(*i*) Dixon *v.* Harrison, Vaugh. 44.

CHAP. III.

Rent-charge assignable.

A rent-charge being something immediately issuing out of the land, is not considered as a mere personal covenant for the repayment of money: and therefore, where a rent-charge was granted to one and his assigns for his life, *pro consilio impendendo,* and it was afterwards assigned over, it was held that the assignee was entitled to distrain for the rent which became due after the assignment. (*k*)

But the arrears of the rent due at the time of the assignment cannot be assigned, for they are a mere chose in action: and it is said, that for such arrears, the assignor has no remedy at all against the tenant, after the assignment, if the tenant has attorned to the assignee; for thereby all privity between himself and the tenant is totally destroyed. (*l*) Such an assignment of the arrears is not however wholly void, for where in a replevin, the defendant avowed for *a rent-charge and arrears thereof,* assigned by a bargain and sale; and issue being taken on the assignment, the jury found, that they were so assigned, and thereupon verdict for the defendant. On its being moved in arrest of judgment, that the jury had found a void assignment, and therefore a repleader should be awarded, the court seemed to think, that the objection could not prevail after verdict. (*m*) Where *services* are granted the grantee may distrain for such as are due in the time of the grantor (*n*)

Within the Annuity Act, 17 G. 3. c. 36.

A rent-charge is however so far considered to be in the nature of annuity, that it is expressly included, in the first section of the annuity act, 17 Geo. 3. c. 26. And therefore rent-charges granted since that statute, are invalid if not enrolled in the manner therein prescribed, unless they fall within the exception contained in the eighth section of the act, namely, as being *A rent-charge given by will, or by marriage settlement, or for the advancement of a child, or being secured upon lands of equal or greater annual value, whereof the grantor was seised in fee-simple or fee-tail in possession at the time of the grant, or secured by the ac-*

(*k*) Maund's Case, 7 Rep. 28. Co. Litt. 144 a.

(*l*) Dixon *v.* Harrison, Vaugh. 40.

(*m*) Guilliams *v.* Munnington, Sir Tho. Raym. 200.

(*n*) 1 Ed. 3. p. 5.

tual transfer of stock, the dividends being of greater or equal value, or a voluntary annuity without pecuniary consideration, or being granted by a body corporate, or under an Act of Parliament, or not exceeding ten pounds annually, unless there be more than one such annuity between the same parties. This exception was held by Lord Thurlow to extend to an equitable, as well as to a legal estate in the land, and to all lands of equal or greater annual value than the rent-charge, notwithstanding they might be incumbered with other charges. (*o*)

And although the statute speaks only of grantors seized in fee-simple or fee-tail in possession, yet it is construed to extend to grants, wherein all parties having power over the fee-simple join, whatever may be the estate of the party in possession; the object of the statute being to protect persons having only life estates, and who therefore are under great disadvantages in raising money by way of annuity; and not to extend to cases where the parties have estates which they may bring to market, and dispose of at a fair value. (*p*) So if the rent be charged both on freehold and leasehold lands, if the former be of equal or greater annual value than the rent-charge, it is equally within the exception of the act, as if it had been secured on such freehold lands alone. (*q*)

Coparceners.

Coparceners are entitled, of common right, to distrain for a rent assigned upon partition, (*r*) provided, it be reserved out of the lands descended: (*s*) and so may their grantees, for it is annexed to the estate. (*t*)

Although coparceners, before partition, are considered in law but as one heir, (*u*) and therefore must join in making a distress; (*x*) it is otherwise after partition; for then they may make several distresses. So that even a rent-charge,

(*o*) Shrapnel *v.* Vernon, 2 Bro. Ch. Cas. 268.

(*p*) Halsey *v.* Hales, 7 T. R. 194. Amherst *v.* Skynner, 12 East, 263.

(*q*) Ex parte Michell, clerk, 2 East, 137.

(*r*) Litt. Sect. 252, 253, and Harg. note (1) on Co. Litt. 153 a.

(*s*) Co. Litt. 169.

(*t*) Butler and Baker's Case, 3 Rep. 22 b.

(*u*) Co. Litt. 163 b.

(*x*) Stedman *v.* Page, 5 Mod. 141. S. C. 1 Salk. 390.

although in its nature entire, and against common right, may be divided between coparceners, and by act of law, the tenant of the land is subject to several distresses. (*y*) But if there be three coparceners, and they make partition, and one of them grant twenty shillings *per annum* out of her part, to her two sisters and their heirs for equality of partition, they shall have this rent in course of coparcenary, and shall join in an action for the same: (*z*) and as this rent is entire in its creation, it should seem, that they must join in a distress. (*a*) So if two coparceners, by deed indented, alien both their parts to another in fee, rendering to them two and their heirs a rent out of the land, they are not joint-tenants of this rent, but shall have it in coparcenary, because their right in the land out of which the rent is reserved, was in coparcenary. (*b*)

One coparcener cannot be deprived of her rights by the tortious acts of another; and, therefore, if there be coparceners of a seigniory, and one of them disseize the tenant of the land, the other coparcener shall distrain for his moiety. (*c*) But if coparceners join together in an act, whereby they entirely depart with their coparcenary estate, as by levying a fine of the rent, even to the use of themselves, it should seem that their former estate is thereby so entirely destroyed, that they cannot afterwards distrain, for the arrears of the rent accrued before the fine levied (*d*)

Although a rent assigned upon partition be in general distrainable of common right, yet partition may be so made, as to sever the rent from the right of distress. Thus, where a lord had two daughters, and died, and upon partition fealty was allotted to the one, and a rent to the other, she had such rent as a rent-seck: (*e*) for here, the coparcener who had the rent, took no estate in the land out of which it

(*y*) Co. Litt. 164 b.
(*z*) Id. 169 b.
(*a*) Stukely *v.* Butler, Hob. 172.
(*b*) Co. Litt. 169 b.
(*c*) Id. 148 b.
(*d*) Semble by the opinion of three Justices. Vaughan, Chief Justice, *contrà*. Dixon *v.* Harrison. Vaugh. Rep. 52.
(*e*) Co. Litt. 150 a.

issued, that being held solely of her who had the fealty, and from the fealty the distress was inseparable. (*f*)

Where there is in one of the coparceners, a unity of seisin or possession in the rent and the land on which it is charged, there, for the benefit of the coparcener entitled to the rent, the law apportions the rent by extinguishing only so much of it as is proportionate to her share in the land; but still the right of distress is in some degree restrained. So that if a woman be seised of a rent-charge, and afterwards the lands charged, descend to her and her two sisters in coparcenary; only a third part of the rent is extinct by such unity of estate: but yet the coparcener who has the rent cannot distrain on the land, for the other two parts of the rent, until partition be made; because until that time, she is seised with her two sisters, *per my et per tout* in the land.(*g*) So if a man seised of four acres of land have issue, a son and a daughter by one venter, and two daughters by another venter, and grant a hundred shillings out of his land to his son in fee, and the son die without issue, in the life of his father; and on the death of the father, the land descend to the three daughters; the eldest daughter cannot distrain for the two parts of the rent, until partition be made.(*h*)

Co-heirs in gavelkind.

Coheirs in gavelkind are parceners by custom; and are governed by the same rules with respect to the right of distress, as parceners at common law.(*i*)

Joint-tenants.

Joint-tenants, like coparceners, hold by one title, and by one right, and are seised *per my et per tout*, of the rent or land.(*j*) And, therefore, as every joint-tenant has an estate in every part of the rent, he may distrain alone for the whole, although he must afterwards avow jointly with his companions, and account to them for their respective shares of the rent. (*k*) And the survivor may distrain for the arrears accrued in the life of his deceased companion.(*l*)

(*f*) Co. Litt. 143 a. 151 b.

(*g*) Bro. Abr. Distr. pl. 38. 65.

(*h*) Id. Exting. pl. 31.

(*i*) Litt. Sect. 241. 265. Leigh *v.* Shepherd, 2 B. & B. 465.

(*j*) Litt. Sect. 288.

(*k*) Pullen *v.* Palmer, 3 Salk. 207. S. C. 5 Mod. 72. Carth. 328.

(*l*) 2 Rol. Abr. 86.

CHAP. III.

Joint-tenants cannot in general by their own act divide their estate to the prejudice of others; (*m*) nor can they, by a tortious act, destroy each other's rights. And, therefore, as in the case of coparceners, if two of them be seised of a seigniory, and one of them disseize the tenant of the land, the other may distrain for his moiety of the rent: (*n*) for this is construed to be a temporary severance of the joint-tenancy, and therefore a moiety only of the rent is suspended by the unity of possession.(*o*)

As in general, joint-tenants cannot destroy the rights which attach upon the land,(*p*) so they cannot charge the land to the prejudice of each other's estate therein. And, therefore, if there be two joint-tenants in fee, and one grant a rent-charge by deed to a stranger, out of his part in the land, such rent-charge is effectual during the life of the grantor, but is void after his decease: and the survivor shall have the whole land discharged of the rent: (*q*) because the survivor claims the land from the first feoffor, which is by a title paramount the grant of the rent-charge. But if there be two joint-tenants in fee, and one grant a rent-charge out of his part, and after release to his joint-tenant, and die, the survivor shall hold the land charged, because he claims under the release of his companion. (*r*)

Upon the same principle, if there be two joint-tenants in fee, and one make a lease for years reserving a rent, and die, the surviving joint-tenant will have the reversion by survivorship, but shall not have the rent, because he claims the land by a title paramount the lease, namely, from the first feoffor, and therefore is a stranger to the rent.(*s*)

It is said, that if two joint-tenants make a lease for years by parol or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone, by way of estoppel.(*t*)

(*m*) Vin. Abr. Apport. B. 17.

(*n*) Co. Litt. 148 b.

(*o*) Id. 188 a.

(*p*) This rule has some exceptions. See Lingen *v.* Payn, Bridg. 129. 2 Inst. 302.

(*q*) Litt. Sect. 286.

(*r*) Co. Litt. 185 a.

(*s*) Ib. Sir J. Bridgman's Rep. 44.

(*t*) Id. 47 a. 214 a.

As joint-tenants are not permitted to charge each other's shares in the land, it is held, that if there be several joint-tenants, and one grant a rent-charge out of his land, the grantee may distrain the cattle of the grantor, but not those of the other joint-tenants; although, as it should seem, he may distrain the cattle of a stranger that come upon the land.(*u*)

But although joint-tenants cannot in general create charges on their co-tenants shares in the land, yet they may sever the joint-tenancy itself in various ways; as by the alienation of any freehold estate in the land, or by voluntary partition at the common law, or compulsory partition under the stat. 31 Hen. 8. c. 1., the effect of which acts is completely to destroy the joint-tenancy, and to create several estates in the tenants; but this cannot be effected by a devise in the will of a joint-tenant, for by his death, the survivorship accrues before the will can take effect.(*x*)

Tenants in common.

Tenants in common do not, like joint-tenants, hold by one title and one right; but by different titles, and have several estates. And, therefore, although they may join in personal actions, yet they cannot join in real actions, or such mixed actions as chiefly arise out of the realty.(*y*) So that, although they may join in a *quare impedit*,(*z*) and even in an action of debt against a lessee for rent,(*a*) yet if they distrain for it, as they must avow separately, it should seem that they must make several distresses. (*b*) For if three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more.(*c*) But if the rent be of an entire thing, as to render a hawk or a horse, then they must of necessity join, the thing being incapable of division.(*d*) And, therefore, if two tenants in common in fee made a lease for life, rendering to them

(*u*) Vin. Abr. Distr. I. 25, 26, 27.

(*x*) Litt. Sect. 287.

(*y*) Litt. Sect. 315. Co. Litt. 195 b.

(*z*) Co. Litt. 197 b.

(*a*) Litt. Sect. 316. Midgley *v.* Lovelace, Carth. 289.

(*b*) Litt. Sect. 317.

(*c*) Pullen *v.* Palmer, 3 Salk. 207.

(*d*) Co. Litt. 197 a.

yearly a certain rent of ten shillings and a hawk, and they distrained, and the tenant made rescous: in this case, although they might have one assize for the hawk, yet they were compelled to have two assizes for the rent, because the whole rent followed the nature of the reversion, which was of several estates; and they were obliged to sever for that part of it which could be divided.(*e*) And, therefore, as it should seem, the distresses in this case, must also have been several, according to the nature of the reversion.

Tenants in common are entitled to receive from the terre-tenant their several proportions of the rent: and therefore where a person holding under two tenants in common, paid the whole rent to one of them, after having received a notice to the contrary from the other, it was held, that the party who gave the notice might afterwards distrain upon the land for his share of the rent. (*f*)

As tenants in common have no original privity of estate between them, as to their respective shares, one may lease his part of the land to the other, rendering rent, for which a distress may be made as if the land had been demised to a stranger. (*g*)

Distress by husband and wife.

It may be considered as a general rule, that in real actions for the lands of the wife, as on a disseisin, (*h*) or in an action of waste, (*i*) the husband and wife must join. In some personal actions they may join or sever at their election; but in general it is held, that in actions, personal or mixed, the wife should not be joined, unless she would have a right of action for the same cause, if she survived. (*k*) This rule may perhaps in general apply to the remedy of distress, which ensues the nature of the distrainor's estate in the rent, or in the land out of which it issues. But whatever may be the nature or quantity of the estate, and

(*e*) Litt. Sect. 314.

(*f*) Harrison *v.* Barnby, 5 T. R. 246.

(*g*) Bro. Abr. Distr. pl. 65. Hudson *v.* Snelgar, 2 Rol. Rep. 212. Snelgar *v.* Henston, Cro. Jac. 611.

(*h*) Odill *v.* Tirrel, 1 Bulstr. 21.

(*i*) Thetford *v.* Thetford, Sav. 11.

(*k*) Staunton *v.* Hobart, 1 Sid. 224.

whether vested in the wife in her own right, or *in auter droit*, in no case whatever can she distrain alone, or indeed bring any action without her husband's being joined. And therefore the only inquiry is, in what cases they may join in the distress, or the husband distrain alone.

We have already seen, that with regard to distrainable rents, except that of a rent-charge, the distress was, at common law, incident to the reversion. And as in all cases, where the wife has an estate of freehold only, or of freehold and inheritance, the immediate reversion of lands in lease is not in the husband alone, but in the husband and wife, in right of the wife, it should seem that when a distress is made in respect of such a reversion, the distress may be joint, as ensuing the nature of their estate therein; whether the rent accrued before or after the coverture. Thus it has been said, that if a woman be endowed of a manor, and marry, and the rent be in arrear, the husband and wife should avow jointly for the rent accrued, both before and after the coverture. (*l*) But where the reversion is a chattel real, as if a woman be possessed of a term for twenty years, and before coverture lease for ten years, the husband may, during the coverture, vest this chattel in himself, by reducing it into possession, and in that case should of course distrain for the rent alone. And indeed, in a variety of cases, not only where the reversion has been a chattel interest, but even where it has been of an estate of freehold and inheritance in the wife, the courts have considered the rent itself to be so much in the nature of a personal chattel belonging to the husband, (*m*) as to hold, that the husband may not only distrain, but even avow for it alone. (*n*) So that it may perhaps be laid down as a general rule, that for all rent due in right of the wife, the husband

(*l*) Bro. Avowry, pl. 70. Rast. 565.

(*m*) North *v.* Wyard, 2 Bulstr. 233. S. C. 1 Rol. R. 52.

(*n*) Bowles *v.* Poore, Cro. Jac. 282. Wise *v.* Bellent, Id. 442. Osborne *v.* Walleeden, 1 Mod. 273. Pullen *v.* Palmer, 3 Salk. 207.

CHAP. III.

may distrain alone, (*o*) even if it accrue to her *in auter droit* as executrix or administratrix. (*p*)

With respect to the remedies for the recovery of *the arrears* of a rent accruing in right of the wife, a distinction must be made, between rent due for land, on which the wife has only a chattel interest; and rent due on land, in which she has an estate of freehold, or of freehold and inheritance. And in some cases, a further distinction must be made, between rent accruing before, and rent accruing after the coverture.

Rent on a chattel interest of the wife.

First, with respect to rent due for land, in which the wife has only a chattel interest, it should seem, that the husband may at any time, during the coverture, distrain for the arrears due before or after the marriage. And if he survive, as the whole chattel will then vest absolutely in him by survivorship, without his doing any act to reduce it into possession, it seems to be perfectly clear, that he may, after the death of the wife, distrain for all the arrears, whether due before or after the marriage. (*q*) But if the husband die without reducing a chattel real of his wife into possession, it survives to her, and the arrears of rent, whether accrued before, or during the coverture, do not belong to the executors of the husband, but go, with the reversion, to the wife surviving, and may be distrained for by her accordingly. (*r*)

But if any act be done by the husband in his life-time, to reduce into possession the chattel real of the wife, her future interest in the rent depends wholly upon the nature of such act of reduction; which may be either partial or total; for a disposition of part of a term, is not a reducing into possession of the whole: so that if a man be

(*o*) Osborne *v.* Wickenden, 2 Saund. 195, and the cases last cited.

(*p*) See Yard *v.* Eland, Lord Raym. 369. Wankford *v.* Wankford, 1 Salk. 306. Ankerstein *v.* Clark, 4 T. R. 617. Parry *v.* Hindle, 2 Taunt. 181.

(*q*) See Co. Litt. 46 b. 300 a 351 a.

(*r*) Acc. Co. Litt. 351 a. 1 Roll. Abr. 350. Contra, Anonymous, Moore's Rep. 7. But this last case does not seem to be law.

possessed of a term of forty years, in right of his wife, and make a lease for twenty years reserving a rent, and die, the wife will take the residue of the term, but the executors of the husband will have the rent; for in this case, it is not incident to her reversion, but a special reservation by lease, to which the wife was a stranger. (*s*)

Rent on a freehold interest of the wife.

With respect to the arrears of rent accruing on land, in which the wife has a freehold interest, there was an important distinction at the common law, as to their accruing before or after the coverture. For if they accrued before it, the husband surviving was not entitled to them, but they belonged to the personal representatives of the wife, who might have sued for them in an action of debt. (*t*) If they accrued during the coverture, and the husband survived, then it was held, that they belonged to him, and that he might bring debt for their recovery: but if the wife survived, then such arrears belonged to her, and did not go to the executors of the husband. (*u*)

These rights of the husband were however materially altered by the statute 32 H. 8. c. 37, by the third section of which it is provided, "That if any man have, in right of his wife, any estate in fee-simple, fee-tail, or for term of life, in any rents or fee-farms, and the same be unpaid in the wife's life, then the husband, after the death of his wife, or his executors or administrators, may have an action of debt against the tenant in demesne, or his executors or administrators, and also that the husband after the death of the wife, may distrain for the said arrears, in like manner as he might have done, if his wife had been living."

The effect of this statute, is therefore to give to the husband the remedy of an action of debt, or a distress, for the arrears accrued before the coverture, for which he had before no remedy at all; and to give him the additional remedy of a distress, for the arrears accrued during the coverture, for which, at the common law, he could have only

(*s*) Blaxton *v.* Heath, Poph. 145. Co. Litt. 162 b. Co. Litt. 46 b.

(*t*) Ognel's Case, 4 Rep. 51 a.

(*u*) Ibid. and Co. Litt. 351 a.

CHAP. III.

an action of debt. (*x*) The remedy of distress given by this statute being confined to the husband alone, but the action of debt for the rent, being extended to his executors and administrators.

With regard to leases made jointly by the husband and wife, although they may not be made conformably to the formalities prescribed by the stat. Hen. 8. so as to bind the wife and her heirs, yet as they seem to be voidable only by the entry of the wife, or those who claim under her, (*y*) they are good until they be so avoided, and the husband's right of distress for the rent reserved, is therefore the same as belongs to leases made by the wife alone before her coverture; for the distress must, in each case, be made in respect of the reversion, in right of the wife.

Distress by tenant by the curtesy.

The chattels real of the wife, as I have already observed, do on her death survive to the husband, and vest absolutely in him: but he has no estate after her death, in her lands of inheritance, unless he can take them as tenant by the curtesy. In those lands which he does take by the curtesy, he has an estate of freehold, and therefore, in contemplation of law, a reversion on all lands of the wife leased for years or lives, and in respect of such reversion, may distrain, *at common law*, for all rents reserved thereon. So a man may be tenant by the curtesy of a rent, in which his wife has an estate of inheritance; and as his estate therein is like his curtesy in lands, a freehold interest, he may, in all cases, distrain for such rent, *at common law*, if it were granted or reserved with a clause of distress; and if there be no clause of distress, he may distrain for it as *a rent-seck*, under the operation of the statute 4 Geo. 2. c. 28.

Distress by tenant in dower, or by free bench.

A woman may be endowed of a rent, as well as of land; whether it be rent-service, rent-charge, or rent-seck; al-

(*x*) Ognel's Case, 4 Rep. 51 a. This proposition is perhaps not true to its full extent, as by the operation of a preceding statute, 21 Hen. 8. the husband was entitled to administration of his wife's effects, and was thereby enabled to acquire an interest in arrears of rent accrued, even before the coverture.

(*y*) Smallman *v.* Agborow, Cro. Jac. 417. Cromwell's case, 2 Rep. 77 b. Jordon *v.* Wikes, Cro. Jac. 332.

though not of an annuity, because that only charges the person, and is not issuing out of lands or tenements. (*a*) Thus if a husband, tenant in fee, make a lease for years reserving rent, and die, his wife shall be endowed of the third part of the reversion by metes and bounds, together with a third part of the rent. (*a*) For the rent is here apportioned by act of law. And therefore, if a widow be endowed of the third part of a rent-service in fee, she may distrain for the third part thereof; as if the tenant hold by a rent of three pounds, she shall distrain for twenty shillings, and the heir shall distrain for the other two parts of the rent. (*b*) So where a woman who had a rent-charge, married with the terre-tenant, who died, and then she distrained for the rent, and afterwards was endowed of the same land, it seems to have been held, that the rent should be apportioned according to its value. (*c*)

At the common law, a widow might be endowed of a rent with or without deed, (*d*) and for such rent, although she had not the reversion, she might distrain of common right. (*e*) And therefore, where the husband held of a lord by homage, fealty and ten shillings rent, and the lord died, it was determined that his widow should have the third part of the rent, which was of the nature of rent-seck, but yet that she might distrain for it *in favorem Dotis.* (*f*)

The time in which a tenant in dower is entitled to distrain for rent of which she is endowed, does in some cases depend upon the nature of the dower itself. For when she is endowed of a thing certain, as in the dower *ad ostium Ecclesiæ*, or *ex assensu patris*, she may enter immediately on the death of her husband, without assignment. (*g*) And where the tenant in dower by her writ demanded land or rent in certain, she might, even at common law, after judgment distrain, before seisin delivered to her by the sheriff on the *habere facias seisinam.* But where the thing is not de-

(*a*) Co. Litt. 32 a.
(*b*) Bro. Avowry, pl. 139.
(*c*) Id. Apport. pl. 20.
(*d*) Colt *v.* Bishop of Coventry, Hob. 140, 153.
(*e*) Co. Litt. 169 b.
(*f*) Anonymous, Keilw. 101.
(*g*) Litt. sect. 39.

manded in certainty by the writ, as where the writ is in respect of a rent-charge of six pounds, and she has judgment to recover the third part, although it be certain that she shall have forty shillings, yet she cannot distrain for them, until delivery by the sheriff. And so, if the wife of one tenant in common demand the third part of a moiety, yet after judgment she cannot enter, and consequently cannot distrain, until it be delivered to her by the sheriff, although such delivery do not reduce it to more certainty than it was before. (*p*)

Tenant in dower holds as in dower, all lands assigned to her by the heir, in respect of dower, although she were not strictly dowable of them. And in like manner she is entitled to hold lands of the husband taken by her from the heir, in exchange for her dower; (*q*) and consequently, may distrain in such lands of common right.

Tenant by free bench.

As a woman may be entitled to a rent as part of her dower at the common law, so she may have it as her *free bench* by custom, out of copyhold tenure. And therefore when a copyholder in fee (there being a custom for a widow's estate) made a lease by licence, reserving rent to him and his wife during their lives, and to his heirs; it was resolved, that the wife should have the rent after her husband's death: and therefore, as it should seem, distrain for it, like other copyhold rents. (*r*)

Distress by tenant in tail.

By the stat. 32 Hen. 8. c. 28. tenants in tail are entitled to make leases not exceeding three lives, or twenty-one years, under certain restrictions prescribed by the act, and such leases are good against the issue in tail, although not against those in remainder. But if a tenant in tail make a lease, not in conformity to that statute, it will be good as against himself, although subject to be avoided, after his death, by the issue in tail. And therefore, such tenant in tail has a reversion on all leases, whether made in conformity to the statute, or otherwise. And consequently may distrain, even at common law, for the rent reserved thereon.

(*p*) Co. Litt. 34 b.

(*q*) Ibid. Hal. MSS. note (9).

(*r*) Sacheverell *v.* Frogate, 1 Ventr. 163. Laugher *v.* Humphrey, Cro. Eliz. 524. Com. Dig. Rent B. 5.

Distress by tenants for life, &c.

Tenants, for their own lives, or *pur autre vie*, or tenants in tail after possibility of issue extinct, have estates of freehold. And therefore, if they make a lease for years, or for the lives of others, reserving rent, they are entitled at the common law to distrain upon their lessee, in respect of the reversion, which in contemplation of law belongs to their respective estates. But if they make a grant which amounts to a disposition of their whole estate, reserving rent, they cannot of course distrain at common law for want of a reversion, unless a power of distress be especially reserved: but by the stat. 4 Geo. 2. c. 28., such rent is now distrainable as a rent-seck.

It may here be proper to remark, that at the common law, if tenant for life made a lease for years, if he should so long live, at a certain rent payable quarterly, and died before a quarter day, the tenant was discharged of that quarter's rent by the act of God, (*r*) for no one was entitled to recover it; and the same was the case if any one having a determinable estate on which the lease depended, died only a day before the rent reserved became due: (*s*) but this is remedied by the 15th section of the stat. 11 Geo. 2. c. 19., which gives an action on the case for the recovery of this proportion of rent, to the executors and administrators of the tenant for life (*t*) dying before the day, on which the rent becomes payable.

Distress by tenant by elegit.

Tenant by *elegit*, who comes in by act of law, and in contemplation of law has only a chattel interest, is yet considered to have so far an estate in the rent of land taken in execution, as enables him to distrain; although, from the nature of his estate, he can have only an uncertain interest in the reversion. (*u*) And where it is necessary to give ef-

(*r*) Clun's case, 10 Rep. 128.

(*s*) Per Ld. Hardw. in Paget *v.* Gee, ap. 1 Burn. Just. 484. Ambl. 198.

(*t*) It has never been determined whether the executor of a tenant *pur auter vie* is within this statute; but per Mansfield, C. J. "He certainly is within the mischief, for otherwise the tenant of the land may keep the rent for his own benefit." Wykham *v.* Wykham, 3 Taunt. 331.

(*u*) Bro. Distr. pl. 72. Pool *v.* Neel, 2 Sid. 29.

CHAP. III.

fect to the writ, the law will apportion the rent; for if a man lease for years reserving rent, and afterwards one moiety of the reversion be taken in execution upon an elegit, the tenant by elegit will be entitled to one moiety of the rent. (*y*) But a tenant by elegit is not within the stat. 32 Hen. 8. c. 37., giving to the executors, &c. of a tenant for life, a distress for the arrears of rent accrued in his lifetime. And therefore, where there was judgment against the tenant for life of a rent charge, and a moiety of the rent was taken in execution under an elegit, and more rent being in arrear, the tenant for life died, it was held, that the tenant by elegit could not distrain for the arrears accrued before the tenants for life's decease, he not being named in the statute, nor coming in under the party, but by act of law. (*z*)

Distress by conusee of a statute.

The conusee of a statute merchant, or statute staple, has also such an interest in the land as enables him to distrain: for indeed an entry under an execution by statute, creates in the conusee a *quasi* freehold in the land, and turns the estate of the conusor into a reversion; (*a*) so that after entry, the conusee is capable of taking a release of the reversion itself, or of surrendering to the reversioner. (*b*)

If a lease for years be made reserving rent, and then the lessor acknowledge a statute, which is extended, the conusee may distrain for the rent accruing after the extent; but he cannot distrain for rent accrued before the extent, although it accrued after the statute was acknowledged. (*b*)

Executors and administrators.

At the common law, neither the heirs, nor the executors or administrators of persons seised either in fee-simple, fee-tail, or for life, of a rent-service, rent-charge, rent-seck, or fee farm, had any remedies for recovering the arrears of rent, incurred in the life of the owner of such rents. (*c*) But by the stat. 32 Hen. 8. c. 37., reciting that, forasmuch as by the order of the common law, the executors or administrators of tenants in fee-simple, tenants in fee-tail, or tenants for term of life, of rent-services, rent-charges, rent-seck,

(*y*) Vin. Abr. Apport. D. 4.

(*z*) Pool *v.* Neel, 2 Sid. 28, 62. Buller N. P. 57.

(*a*) Dighton *v.* Greenvil, 2 Vent. 327. Corbet's case, 4 Rep. 82.

(*b*) Co. Litt. 270 b.

(*c*) Co. Litt. 162 a.

and fee farms, had no remedy to recover such arrearages of the rents or fee farms, as were due unto their testators in their lives; nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, could distrain, or have any lawful action to levy any such arrearages of rents, or fee farms due unto him in his life as aforesaid: it is by the first section provided, that the executors and administrators of every such persons, to whom any such rent or fee farm shall be due at the time of their deaths, may distrain upon the land charged with the rent, and chargeable to the distress of the testator, in like manner as the testator himself might have done, so long as the lands remain in the possession of the tenant in demesne who ought to have paid the rent or fee farm, or of any other person claiming by and from him, by purchase, gift, or descent.

The second section of the statute exempts from its operation, lands in Wales, the tenants of which had been accustomed to pay a sum of money to the lord, for redemption of the arrears.

And the fourth section enables tenants *pur autre vie*, and their executors and administrators to distrain for the arrears due at the death of the *cestui que vie*, upon the lands and tenements out of which the rents or fee farms issue, in the same manner as might have been done, during the life of the *cestui que vie* himself.

Upon this statute, Lord Coke says, That the preamble concerning the executors or administrators of tenant for life is to be understood only of tenants *pur autre vie:* (*e*) but it has been since determined, that the statute extends to all tenants for life. (*f*) It should however be observed, that it comprises only persons strictly claiming under the deceased tenants. And therefore where a moiety of the rent was taken in execution under an elegit, and the tenant for life died, it was held that the tenant by elegit could not distrain for the arrears due at his death; because he was not named

(*e*) Co. Litt. 162 a. S. V. Harg. note (4) ibid.

(*f*) Hool *v.* Bell, Lord Raym. 172.

CHAP. III. in the statute, and did not in strictness come in under the tenant for life, nor by his act, but by act of law. (z)

The arrears to be distrained for under this statute, must be such as were chargeable to the distress of the testator at the time of his death. So that if one be seised of a rent, and he grant over such rent being in arrear, and the tenant attorns, the distress for such arrears is gone. (a) and so if the lord grant away his seigniory, and die, his executors shall have no distress for the arrears. (b) Neither does the statute extend to the arrear of a *nomine pœnæ*, or for relief, or aid. (b)

It however comprises the arrears of all kinds of rent, except corporal services, issuing out of a freehold or inheritance, whether they be in money, corn, cattle, or any other profit to be delivered or yielded; and whether they be annual, or payable every two, three or four years; (b) but such rents must be issuing out of freehold lands, the statute not extending to copyhold rents, nor even to free-rents, unless there be a privity between the lord and the tenant, as by attornment. (c)

By the words of the statute, the distress must be made on the lands whilst in the possesion of the "tenant in demesne," or some person claiming under him, by purchase, gift, or descent; and therefore it extends to the possession of those persons only, who claim under the tenant, and does not comprise the lord claiming by escheat, tenant in dower, or by the curtesy, for they come in, not under the party, but by act of law. (d) This clause has not however received the strictest construction; for where *A.* being seised of a reversion in fee after the determination of an existing lease for years, granted a rent-charge in fee, and after the expiration of the lease, infeoffed *B.* in fee; and then the grantee made his executors and died, and *B.* made a lease at will:

(z) Pool *v.* Neel, 2 Sid. 28, 62.

(a) Ognel's case, 4 Rep. 50, 51. Dixon *v.* Harrison, Vaugh. 40.

(b) Co. Litt. 162 b.

(c) Appleton *v.* Doily, Yelv. 135. S. V. Cordell and Clifton's case, 2 Leon. 152. and Gilb. Ten. 186.

(d) Anonymous, 418. 1 Leon. 302.

the executors of the grantee having distrained upon the lessee at will for the arrears due in the lifetime of the grantee, and before the expiration of the lease for years; it was agreed, that the arrears were lost at the common law, but it was at the same time determined, that although the lessee at will claimed immediately under the feoffee, and not under the tenant in demesne, (who in this case was the grantor) yet that the remedy having been destroyed by the act of God, namely, by the death of the grantee, the statute should be liberally expounded as a remedial law, and the lessee at will be considered as holding *under* the grantor, because he in effect held *from him*, and as such, that he should be charged with the arrears by the statute. (*g*) So, if the tenant in fee make a gift in tail, and the donee die, the issue in tail is within the statute, for he claims, *only under the title and estate* of the tenant in demesne, although he does not claim only by descent, but *per formam doni*. So if there be tenant in tail with the remainder over in fee, the issue in tail is within the statute. (*h*) And where *A.* granted a rent-charge to *B.* and the rent being in arrear, *B.* died, and then *A.* enfeoffed *C.* in fee, who many years afterwards enfeoffed *D.*, who enfeoffed *E.*, it was held by the opinion of three justices, that *E.* should be chargeable with the arrears to the executors of *B.* (*i*) But neither the remainder-man, nor the reversioner can be said, in any manner, to claim under the tenant for life, or in tail. And therefore, if the tenant in demesne make a lease for life, the remainder for life, the remainder in fee, and the tenant for life, do not pay the rent due to his lord, and then the lord die, and the tenant for life dies, the executors cannot distrain upon him in remainder, because he does not claim, *by or from* the tenant for life. And so it is in the case of a reversioner (*k*)

It is otherwise, however, with respect of estates *pur autre vie*, for if a man grant a rent-charge to *A.* for the life of *B.*,

(*g*) Ognel's case, 4 Rep. 48 b. Case, 418. S. C. Id. 3. 263.
(*h*) Id. 50 b.
(*i*) Anonymous, 1 Leon. 302.
(*k*) Co. Litt 162 b.

and make a lease to *C.* for life, remainder to *D.* in fee, and the rent be in arrear, and then *B.* die, and afterwards *C.* dies also; *A.* may distrain *D.* in remainder for all the arrears. And this difference arises from the diversity of the first and fourth sections of the statute; the latter in the case of an estate *pur autre vie,* giving a distress generally, on the lands themselves, out of which the rent issues; without the restriction continued in the first section; which applies to all other estates, and confines the distress to the possession of the tenant, from whom the rent is due, or the possession of persons claiming, by and from such tenant by purchase, gift, or descent. (*l*)

It has been doubted, whether a rent-charge granted for years, or a lease for years on which rent reserved, be within this statute. And therefore, where one granted to another a rent-charge for ninety-nine years if he should so long live, and the grantee died, and his executors distrained for the arrears; the court held the case not to be within the statute; because the executors of the grantee were not without a remedy at the common law, inasmuch as they might have an action of debt for the rent. (*m*) But this is a very unsatisfactory reason; for it is expressly the opinion of Lord Coke, that the statute does give further remedy, in some cases, where there was a remedy at the common law. (*n*) There is however, a much better reason for this decision, namely, that terms for years are not mentioned in the statute; and therefore Lord Coke says, If a man make a lease for life or lives, or a gift in tail reserving a rent, this is a rent-service within the statute; (*o*) "from whence it may be inferred," says Mr. Justice Buller, (*p*) "that he thought a rent reserv-"ed upon a lease for years was not within it; and I ap-"prehend that it is not; for the landlord is not tenant in "fee, fee-tail, or for life of such a rent; and it is the exe-"cutors of such only, who are mentioned in the act. How-"ever in trespass, where it appeared that the defendant had

(*l*) Co. Litt. 162 b. and Edrich's Case, 5 Rep. 118.

(*m*) Turner *v.* Lee, Cro. Car. 471.

(*n*) Co. Litt. 162 a.

(*o*) Co. Litt. 162 b.

(*p*) Bull. Ni. Pri. 57.

"distrained the plaintiff's goods, for rent due to his tes-"tator upon a lease for years, Lord Chief Justice Lee "held it to be within the statute, and the defendant ob-"tained a verdict." But this decision at *Nisi Prius* can hardly be sufficient to weigh against the authorities that oppose it. (*p*)

In all cases therefore, where the testator or intestate was seised of a rent of any kind, either in fee-simple, fee-tail, or for life, his executors or administrators may distrain for the arrears incurred in his lifetime, under the operation of this statute. But as, in all cases, where the testator dies seised of an estate of inheritance, which descends to his heir, such heir is of course entitled to the rent, accruing at any time after the decease of the ancestor; it has, in some cases, become a question of great nicety, to determine whether a certain portion of the rent did accrue before, or after that event. Thus Lord Hale says, if a man seised in fee make a lease for years rendering rent, and on the day on which it is payable, he dies after sunset, but before midnight, his heir shall have this rent, and not his executors; because the rent is not due until the last minute of the natural day. (*q*) But a distinction has been taken, between a lease made by a tenant in fee or under a power, and one made by a bare tenant for life, it being held in the latter case, that if the lessor lived to the beginning of the rent-day that was sufficient to give the rent to the executor, rather than that it should be lost; (*q*) but this case, as I have before stated, is now provided against by the stat. 11 Geo. 2. c. 19. s. 15., which gives to the executors or administrators of such tenant for life, dying on the rent-day, the whole of the rent reserved and if dying before it, a proportionate part.

Rents in which the testator or intestate had an estate of freehold, or of freehold and inheritance, are therefore within the statute of Hen. 8.; but for arrears incurred in his lifetime, on a lease for years, no distress can be made by his

(*p*) Meriton *v.* Gilbee, 2 Moore, 48.

(*q*) Duppa *v.* Mayo, 1 Saund. 287. note 17.

executors or administrators, otherwise than at common law. Now at the common law there does not seem to be any case, in which executors or administrators can distrain for the arrears, due in the life of their deceased testator or intestate, unless the term, with the reversion thereon, vest in them in their representative characters. As if lessee for fifty years, lease for twenty years, reserving rent, and die during the latter term; here the term will vest in his executors, with the reversion for the residue of the fifty years; and therefore, in respect of that reversion, they may distrain for the arrears at the common law, and as it should seem, may even distrain for them, as in their own right; (*s*) but if the testator by his will specifically bequeath his reversionary interest in the term, it is necessary that his executor should distrain for the arrears, before his assent to the legacy; as the reversion will thereby be vested in the legatee; (*t*) and being thus divested out of the executor, by his own assent, it should seem, that he can no longer distrain for the arrears incurred in his testator's lifetime; although he may have an action on the contract against the lessee. (*u*)

Where a term for years vests in executors or administrators, they may, of course, distrain for the rent accruing in their own time, as if they were entitled to it in their own right; and so likewise their executors after them.(*v*)

Heirs.

The same principle applies to the right of distress by an heir, whether he be heir of tenant in fee-simple, or fee-tail; or whether he take by descent at the common law, or by custom; namely, that the distress shall follow the nature of the estate in the land or rent. For if the rent be not specifically reserved, the law will distribute it according to the

(*s*) Wade *v.* Marsh, Latch. Rep. 211.

(*t*) See post. p. 60.

(*u*) It may perhaps be thought, that such arrears, although separated from the reversion, are distrainable as a rent-seck within the 5th sect. of 4 Geo. 2. c. 28: but there seems to be great difficulty in contending, that the statute can operate upon part of a rent as a rent-seck, whilst the remainder continues to be a rent-service.

(*v*) Norton *v.* Hervey, 1 Vent. 259. Druce *v.* Bailey, 1 Vent. 275.

estate. And if the reservation be bad, the law, in general, will not suffer it to destroy the rent, but carry it along with the estate, to him to whom the reservation should have been made.

As where a rent-charge was granted to *A.* for forty years with a clause of distress for *A.* and his heirs during the term, it was ruled that the executor should have the rent and distrain for it, and not the heir. (*w*) However although it will sometimes supply a defective, or correct an erroneous reservation, it will not aid an uncertain one, even in favour of an heir. And therefore, if a man reserve a rent to him *or* his heirs, the rent is good for the term of his life, but void as to his heirs.(*x*) So the law will not cure a reservation *specifically* bad ; as where in a case already cited, tenant in fee-simple, together with his son and heir apparent, made a lease for years, to commence after the father's death, reserving the rent to the son by his proper name, but not reserving it to the heirs of the lessor, it was held that the son could not take the rent at all; for it could not be reserved to him as a stranger, and it was not reserved to the heirs of the lessor. (*y*)

So where a man possessed of a lease for years assigned his estate to *A.*, reserving a rent to himself and his wife and the survivor, during the aforesaid term if they should so long live, the rent endured no longer than during the husband's life ; for the reservation to the wife was void, she being no party in interest or to the deed, and the express reservation of the rent during the lives of the parties, limited and controuled the effect of the general reservation during the term, and excluded the administrator of the husband. (*z*)

It has also been said, that if a man make a lease for life, reserving rent to him and his executors, neither the executor, nor the heir shall have the rent. (*a*) But this

(*w*) Darrell *v.* Wilson, Cro. Eliz. 644.

(*x*) Co. Litt. 214 a.

(*y*) Oates *v.* Frith, Hob. 130. Cother *v.* Merrick, Hard. 95.

(*z*) Bland *v.* Inman, Cro. Car. 288.

(*a*) 1 Brownl. and Goldesb. 30. Richmond *v.* Butcher, Cro. Eliz. 217.

this may well be doubted, for if lessee for hundred years, let for fifty, reserving rent to him and his heirs, *during the term*, it seems that the rent will go to the executor; (*c*) for in this case, to permit it to follow the reservation, would be to contradict the law, and to suffer it to be destroyed, would be to defeat the evident intention of the parties. Where a reservation is specific, although it may be defective, yet if agreeable to law, it will not be extended in favour of an heir. And therefore, when a man seised of two acres, let one reserving rent to himself, and the other reserving rent to him and his heirs, it was held, that the first reservation should determine with his life: the difference of the two reservations strongly implying an intention to exclude the heir from one of the rents; (*c*) but it is said that if a lord grant a copyhold in fee rendering to the grantor a certain rent and performing the services due, the heir of the lord shall have the rent, (*d*) and the heir will be entitled to a rent, although not named in the reservation, if he be named in the clause of distress. (*e*)

The true principle of determing, in what cases the heir shall have the rent, seems to be, to consider the nature of the estate descending upon him, either in the rent, or in the land out of which it is reserved. And therefore if a tenant in tail make a lease, and reserve the rent generally to his heirs, it will go with the reversion to the heirs in tail. Thus where tenant in tail male had issue two sons by different venters, and died, and the eldest son entered, and made a lease for twenty-one years reserving rent generally to him, his heirs, and assigns, and died without issue, leaving two sisters his heirs at law; it was held, that the rent should go, along with the reversion, to the brother of the half blood, who was heir to the entail and reversion, although not heir to the lessor. (*f*) And so in a customary estate, as of gavelkind tenure, if the rent be reserved ge-

(*c*) Sacheverell *v.* Frogate, 1 Ventr. 162.

(*d*) Dyer, 45. pl. 1. in marg.

(*e*) Co. Litt. 148 a. n. (1) and Stafford's Case, Dyer, 253.

(*f*) Cother *v.* Merrick, Hardr. 91.

nerally, it will go to the customary heir, and in an estate descending *ex parte maternâ*, it will go to the heir on the part of the mother. (*g*) Or if a man seised in fee, make a lease for years reserving rent to himself, his executors and administrators, and die, during the continuance of the lease, this rent, notwithstanding the express reservation cannot go to the executors, but will descend with the fee to his heir. (*h*)

When the heir is entitled to a rent, he is also entitled to all its incidents, and therefore a *nomine pœnæ* to secure the rent, will likewise descend to him. (*i*) But the heir's right of distress does not extend to the arrears of rent accrued in the life of the ancestor, for such arrears belong to the personal representatives of the ancestor, and not to his heir. But, as we have before seen, he is entitled to all rent accruing, even but an hour after his ancestor's decease. (*k*) And if rent be reserved payable at either of two periods, at the election of the lessee, and the lessor die between them, the rent being unpaid, it will go to the heir. (*l*)

Devisees and legatees.

Devisees, like heirs, may distrain in respect of their reversionary estate; for by a devise of the reversion, the rent will pass as its incident. (*h*) And even at the common law, before the statute of wills, (*m*) it was held, that devisees by custom might distrain for rent, without the attornment of the tenant to give them seisin, because the will of the testator might otherwise have been defeated. (*n*)

Like persons taking by descent, devisees were entitled to the benefit of an apportionment of the rent. So that if a tenant by knight's service had, after the statute of wills, devised the reversion of two parts of the land, the devisee would have had two parts of the rent. (*o*) It is also held,

(*g*) Cother *v.* Merrick, Hardr. 95. Randall *v.* Jenkins, 1 Mod. Rep. 110.

(*h*) Sacheverell *v.* Frogate, 1 Ventr. 161.

(*i*) Co. Litt. 162 b. Bendloss *v.* Phillips, Cro. Eliz. 895.

(*k*) See ante, p. 55.

(*l*) Clun's Case, 10 Rep. 128 b.

(*m*) 32 Hen. 8. c. 1.

(*n*) Litt. Sect. 585, 586.

(*o*) Co. Litt. 148 a.

that a rent may be devised or bequeathed, although it be suspended by the testator's uniting the possession of the rent and the land (*q*) provided it be not extinguished. (*r*) In all cases therefore, where there is a unity of possession in the rent, and the land out of which it issues, it becomes a question, whether by means of it, the rent be extinguished, or only suspended. And in the bequest of a chattel, this question may arise, not only with respect to a unity of possession in the testator, but even in his executor. As to which, in a case where a man by his will bequeathed to his wife a term of years, for so long time as she should continue unmarried, and after her marriage, a rent payable out of the same lands, and made her his executrix: although the whole term vested in her as executrix, yet it was held, that it did not extinguish the rent by unity of possession. (*s*)

It was formerly doubted, whether a rent-charge *pur autre vie* was deviseable within the statute of wills; but it has been decided that it is so; and that the devisee may distrain for it, within the stat. 32 Hen. 8. c. 37. (*t*)

Where a rent alone was devised without any estate in the land, it seems formerly to have been necessary for the devisor to give a power of distress that is in effect to make it a rent-charge, in order to entitle the devisee to distrain: (*u*) but this cannot now be necessary, if the rent be devised either for an estate of freehold in the devisee, or be granted out of an estate of freehold in the devisor, as in either case it must be considered as a rent-seck, to which the stat. 4 Geo. 2. c. 28. s. 5. has extended the right of distress. (*x*)

There is however one considerable difference between the devise of a freehold estate or rent, and the bequest of a chattel interest; for the devise vests absolutely by the testator's will, but the interest of the legatee must await the

(*q*) Cader *v.* Oliver's Case, 3 Leon. 154.

(*r*) Anonymous, 2 An. 194. Stafford's Case, Dyer, 253. Long *v.* Buckeridge, Stra. 106.

(*s*) Gouge *v.* Hayward, Bridgm. Rep. 54. S. C. 1 Roll. Abr. 610.

(*t*) See Pool *v.* Neel, 2 Sid. 22. Myles *v.* Willoughby, Cro. Eliz. 547.

(*u*) Gouge *v.* Hayward, Bridgm. 52.

(*x*) Vide post, p. 67.

executor's assent to the bequest. And therefore, before such assent, the interest remains in the executor, and consequently the legatee cannot distrain. (*y*)

This assent may be either express or implied; but it must relate to the particular subject of the legacy. So that if one bequeath a rent to *A.*, and the land to *B.*, the executor's assent that *A.* shall have the rent, is no assent that *B.* shall have the land, because the rent and the land are distinct legacies: (*y*) but his assent to the bequest of the land, seems to imply his assent to the bequest of the rent; for when the land is gone, it is indifferent to the testator's estate, whether it be charged with the rent or not. (*y*)

The executor's assent may be either absolute or conditional; and where it is conditional, the legatee's interest in the request, must of course be subject to the condition imposed. (*y*)

Trustees, assignees, guardians, committees, and receivers.

Persons who have vested in them legal estates, though in trust for others, as the trustees of a feme covert, or the assignees of a bankrupt, may of course distrain for rent, in respect of such legal estates, in the same manner as if they were beneficially interested therein. There are however some other persons, of a nearly similar description, whom it may be proper to mention more particularly; namely, guardians, committees of lunatics, and receivers appointed by the Court of Chancery.

Guardians.

In our ancient law, the rights of guardian, especially in chivalry, formed a very important topic of inquiry. But the stat. 12 Car. 2. c. 24. having changed all the ancient military tenures into socage, it is sufficient at this time, to speak of the guardian in socage, and of the testamentary guardians appointed under the authority of the same statute. These guardians, as they do not derive their title from the infant himself, but from the appointment of the law, are considered as having, not a bare authority, but an interest in the lands of the infant, and therefore may make leases of his lands in their own names, which will be good during the

(*y*) Toller's Law of Executors, 239, 240, 242, 243.

CHAP. III.

minority of the ward. (h) And consequently, in respect of such leases, they possess the same powers of distress, as other persons granting leases in their own right. (i)

Committees of lunatics.

Committees of the estates of lunatics, were formerly persons appointed by the Court of Chancery only to superintend and manage such estates, but not possessed of any interest therein. They are however now enabled by the stat. 43 Geo. 3. c. 75., to grant leases of the lunatic's estate, under the direction of the Lord Chancellor; and therefore, like other lessors, are entitled to distrain for the rent accrued.

Receivers.

It is said that receivers appointed by the Court of Chancery have a right to distrain, and may do so without waiting for the order of that court. (j) But such receivers having no estate whatever in the land, cannot of course distrain in their own names: and are therefore to be considered merely as bailiffs or stewards, distraining, under the sanction of the court, in the name of the person legally entitled to the rent.

Distress by Corporations.

Corporations with reference to their powers of distress, may be divided into sole and aggregate; the respective rights of which, both as to the remedies of action and distress, differ in some respects, from those of common persons.

Distress by the king.

The first to be considered is that of the King, who by his prerogative, is entitled to peculiar legal remedies, and among the rest to a more ample and beneficial power of distress for rent, than belongs to a subject. For at the common law, if a grant of land or rent were made to the king, he could distrain without attornment, by virtue of his prerogative. (k) And he may now distrain for a rent-service, or fee-farm, not only on the land of his tenant, out of which it is reserved or granted, but also, on all the other lands of the te-

(h) See Wade v. Baker, 1 Ld. Raym. 131., and 10 East. 495 *in notis.*

(i) Shopland v. Rydler, Cro. Jac. 55, 98. Bedell v. Constable, Vaugh. 179.

(j) Pitt v. Snowden, 3 Atk. 750.

(k) Co. Litt. 309.

nant, although held of other lords. (*l*) And he has the same prerogative with respect to a rent-charge, (*m*) and even a rent-seck, although it vest in him, not by grant, but by escheat upon attainder: (*n*) provided, that the lands to be distrained upon, be in the actual possession of his tenant. (*o*) If however the king's tenant make an underlease, *after* arrears of rent incurred, the king has a right of distress upon all the lands of his under-tenant, for the rent due to the crown upon the land so underleased. (*p*)

Distress by his grantee.

Not only the king, but even his grantee, has some peculiar privileges of distress. For at the common law, if the king granted to a subject a reversion or services, the estate passed immediately without attornment, and the grantee might distrain, (*q*) unless it were of lands held of the Dutchy of Lancaster, and not situate within the county palatine. (*r*) The statute of 22 Car. 2. c. 6. for the sale of the fee-farm rents of the crown, gives to the vendees of such rents, the same remedies for the recovery of them as were possessed by the crown; and therefore they may distrain upon all the lands of the original grantor. And as it should seem, either the king or his vendees, may make such a distress, although the lands distrained upon, be under a sequestration. (*s*) But the statute does not extend to any other than the fee-farm rents sold under its authority; and therefore the king's grantee of a rent-charge, cannot now, any more than he could at the ancient common law, distrain in any other lands than those upon which the rent is charged. (*t*)

Distress by other corporations sole.

Corporations sole, except the king, whether ecclesiastical or civil, do not possess any peculiar rights, or lie under particular disabilities, with regard to the power of distress; but

(*l*) Bro. Prerog. pl. 77.

(*m*) Ibid. pl. 68.

(*n*) Warden and Commonalty of Sadlers case, 4 Rep. 56. Keilw. 194 a. 11. Parker 134.

(*o*) 4 Inst. 119. 2 Inst. 132.

(*p*) 1 Rol. Abr. 670.

(*q*) Id. 294.

(*r*) Co. Litt. 314 b. Dutchy of Lancaster case, Plowd. 221. 4 Inst 209.

(*s*) Attorney-General *v.* Mayor of Coventry, 2 Vern. 713. 1 P. Wms. 306. S. C.

(*t*) Bro. Prerog. pl. 68. And see Statham Abr. Distress, pl. 2.

fall under the general principle, of distraining according to the nature of their estate. Freehold interests in land or rents, descending to the successors of sole corporations, but chattels real and personal to the executors or administrators of the lessor or lessee, (*u*) except in some cases by particular custom. (*x*)

With respect to leases made by corporations, whether conformable to the statutory provisions so as to bind the successor, or otherwise, the remedy of distress is the same as belongs to such a lease at the common law, at least with respect to the lessor. For "though leases contrary to these "acts are declared void; yet they are good against the "lessor during his life, if he be a sole corporation; and are "also good against an aggregate corporation, so long as the "head of it lives; who is presumed to be the most con-"cerned in interest: (*y*) therefore if good against the lessor, they would generally be good against the lessee by the mutuality of estoppel.

By Corporations aggregate.

Corporations aggregate, whether civil or ecclesiastical, cannot in general perform any acts *in pais*, but under their common seal: (*z*) and therefore they should both make and accept leases or other conveyances of land or rent, under such seal. But if a lease be made by the agent of a corporation, not under their common seal, although it may be invalid as a lease, for want of due execution; yet if the tenant hold under it, and pay rent to the bailiff of the corporation, that is sufficient to constitute a tenancy at least from year to year, and to entitle the corporation to distrain for the rent. (*a*) And their bailiff to make cognizance, although he had no written warrant of distress. (*b*)

Bodies politic and corporate, are by the stat. 4. Geo. 2. c. 28. placed on the same footing as other persons, with

(*u*) Co. Litt. 9 a. 46 b.

(*x*) Ibid. et Harg. note (1) on Co. 9 a.

(*y*) Bl. Comm. 2, 321.

(*z*) Mayor of Thetford's case, 1 Salk. 192.

(*a*) Wood *v.* Tate, 2 New Rep. 247.

(*b*) Manby *v.* Long, 3 Lev. 107.

respect to the recovery of rent-seck, chief rents, and rents of assize.

Distress by a lord for copyhold rents.

The lord of a manor may, of common right, distrain for the rent due from the tenants of his manor; (*s*) for to this tenure fealty is incident, and therefore such rent is in its very nature a rent-service: and the lord may distrain for it not only on the copyholder himself, but his lessee, the lands being chargeable in the hands of any one claiming under the copyhold tenant; (*t*) although they are not chargeable in the hands of a new tenant admitted to the copyhold, for the rent due from his predecessor.(*u*) But if the lord parts with his manor, all privity of estate is destroyed between him and the copyhold tenants, and therefore he cannot afterwards distrain for arrears of rent before incurred.(*u*)

It has been already observed, that copyhold rents have been considered not to be within the stat. 32 Hen. 8. c. 37; but this seems to be questioned by a learned writer, who is also inclined to think that rents of assize issuing out of copyhold lands, are equally within the stat. 4 Geo. 2. c. 28. s. 5. as if they issued out of freeholds; and that if it were proved, that the rents claimed were the usual or accustomable rents reserved, it would be incumbent on the other party, to shew that they had not been answered or paid within the period prescribed by that statute. (*u*)

Mortgagor and mortgagee.

Upon the execution of a mortgage, the legal estate in the mortgaged premises vests at once in the mortgagee, and if they are not in lease, he is consequently entitled to the immediate possession. It is indeed usually stipulated, that the mortgagor shall continue in possession until default be made in repayment of the loan at the time specified in the proviso for redemption; but he has thereby no estate in the land, and is only entitled to hold it, and receive the rents and profits during that period, under the authority of the

(*s*) Laugher *v.* Humphrey, Cro. Eliz. 524.

(*t*) Vide Fairclaim d. Fowler *v.* Shamtitle, Burr. 1290, 1291, where it is said, *arguendo*, that a lord of a manor has such a seisin at law of an escheated copyhold, that the occupier is his tenant at will, and the lord may distrain for the rent.

(*u*) Watk. on Cop. vol. 2. p. 180. 181, 182.

mortgagee.(z) But as the mortgaged premises may at the time of the mortgage, be subject to a lease, or may during the continuance of the mortgage, be leased by the mortgagor, it becomes necessary to consider, what are the respective interests of the mortgagor and mortgagee in the rent in these two cases.

Where the premises are leased before the mortgage, it is clear that the possession of the tenant cannot be disturbed by the mortgagee, who comes in by a later title; although, as the assignee of the lessor, he is of course entitled to demand the rent accruing after his right of possession: and, therefore, if the mortgagee give notice to the tenant to pay the rent in future to himself, instead of paying it to the mortgagor, he may certainly distrain for any rent becoming afterwards in arrear. And it has been decided, that after a demand made on the tenant for arrears accrued before such demand, but subsequently to the mortgage, the mortgagee may distrain for those arrears.(a) For by the mortgage, the estate of the mortgagor is transferred to the mortgagee, to whom, from the time of the mortgage, the rent is due. And whether the rent be in arrear before, or after the notice, can make no difference to the tenant, who after such notice, is bound to pay the rent in hand, according to the legal title: and therefore his payment of it to another can be good, only where he has no notice of the mortgage, or where he may be considered as paying it with the mortgagee's consent.

There may, however, be some doubt respecting a mortgagee's right to distrain upon a lease made by the mortgagor after the mortgage: for it has been determined, that where a lease was made by the mortgagor, for the term of seven years, at a rack-rent, the mortgagee having no notice of the

(z) In Birch *v.* Wright, 1 T. R. 382. The mortgagor is considered as a kind of tenant at will, or by sufferance to the mortgagee, but this can apply only to those cases, where there is no such stipulated time of possession, or where the mortgagor is *permitted* by the mortgagee to continue in possession after the expiration of that time.

(a) Moss *v.* Gallimore, Doug. 278.

lease, and the lessee having no notice of the mortgage, the mortgagee was entitled to bring ejectment against the lessee, even without a notice to quit; upon the ground of the lease's being subject to every circumstance of the mortgage, and of the mortgagee's right of posssession.(*b*) This case therefore proves, that such a lease is absolutely void as against the mortgagee, and he could not perhaps, by any act of assent, so far establish it, as to make the tenant hold of him under the lease itself: but his assent to the tenant's possession might create a tenancy under himself from year to year; and the lease being considered only as evidence of the *quantum* of rent, the mortgagee might perhaps be entitled to distrain for it accordingly.

Distress by the mortgagor.

For the rent reserved by such a lease, if it were made by deed indented, and the lessee were not evicted by the mortgagee, the mortgagor would be entitled to maintain an action of debt or covenant on the deed, and as it should seem, distrain for the rent reserved, by virtue of the estoppel. But for the arrears due on a lease made before the mortgage, the mortgagor cannot in any case distrain; for here there is no estoppel after the mortgage, by which all privity between the mortgagor and the tenant is completely destroyed.

Distress by lessors on leases for years, &c.

Having already minutely inquired into the rights of distress for rent, as incident to persons in the several legal characters or relations before enumerated; very little remains to be added, as to the general right of distress for rent reserved on leases for years, or other less period of time.

From our preceding inquiry it appears, that persons standing in the situation of landlords or lessors for years or at will, might even *at the common law*, have distrained for the rent reserved upon such lease or demise, provided they had a future reversion in the land, whether immediately expectant on the determination of the term, or at a more distant period.(*c*) But the necessity of a reversion to support a distress is now materially altered by the operation of

(*b*) Keech *v.* Hall, Doug. 21. East. 449.
Thunder d. Weaver *v.* Belcher, 3

(*c*) Co. Litt. 142 b.

CHAP. III.

the statute 4 Geo. 2. c. 28. s. 5. by which, as I have before observed, all rents-seck are made distrainable: (*d*) and therefore a reversion is no longer requisite to support a distress, for that which is a rent-seck within the meaning of this statute. But at the common law it was not every reservation, though *nominally of rent*, which constituted *a rent* properly so called: for as we have before seen, if an annual sum of money were reserved upon the grant of an incorporeal hereditament, the sum so reserved, was not *a rent*, but only *a personal annuity*. (*e*) And therefore nothing is distrainable within the statute of Geo. 2. which is not such a reservation as would have been at least a *rent-seck* at the common law: and as it seems to have been a rule of the common law, that *a rent* could not issue out of a mere chattel, (*f*) it has been determined on this principle, that even since the statute, if a lessee for years assign over his whole term reserving a rent, without a special clause of distress, he cannot distrain for the rent so reserved. (*g*) In a case

(*d*) See ante, p. 22.

(*e*) See ante, p. 15.

(*f*) See Butt's Case, 7 Rep. 23. Lord Mountjoy's Case, 5 Rep. 4. The Earl of Stafford *v.* Buckley, 2 Ves. Rep. 170. Turner *v.* Turner, 1 Bro. Ch. Rep. 316.

(*g*) ——— *v.* Cooper, 2 Wils. Rep. 375. Poultney *v.* Holmes, Stran. 405. Parmenter *v.* Webber, 8 Taunt. 593, *et vide*. Hoby *v.* Roebuck, 2 Marsh. 433. In ——— *v.* Cooper, the first decided case upon this point, the Court of Common Pleas is reported to have expressed itself as follows:— "There are two ways of creating "a rent; the owner of the lands "either grants a rent out of it, or "grants the lands, and reserves "a rent; there is no such thing as "a rent-seck, rent-service, or rent-"charge, issuing out of a term for "years. Bro. Dette, pl. 39, cites "43 Edw. III. 4. per Fynchden, "Chief Justice, C. B. If a man "hath a term for years, and grants "all his estate of the term, ren-"dering certain rent, he cannot "distrain, if the rent be in arrear. "This case is law, and in point; "therefore if the avowant will "recover what is owing to him "from the plaintiff, he must bring "his action upon the contract." It is much to be regretted, that we have not a more satisfactory report of the reasons upon which the Court formed their judgment on so important a subject; for the passage quoted from Brooke, affords no proof of the point for which it is cited; and it is quite clear that *a rent-charge* may be granted for years; and that it may issue out of a mere chattel, and

also, where a lessee for years assigned over his term, and afterwards the lease came back into the hands of the original lessor, by an agreement between him and the assignee, that the lessor should have possession of the premises, paying a certain sum annually above the rent, towards the good-will already paid by the assignee; it was held, that such agreement operated as a surrender of the whole term; and therefore, that the sum so reserved, was a mere *annual sum in gross*, and not a rent for which the lessee could distrain. (*h*)

It will be observed, that these cases do not at all apply to any reservation or grant of rent, during an estate of freehold, which was unquestionably *a rent* at the common law, and as such is distrainable as a *rent-seck* within the statute, without a reversion or a clause of distress.

With respect to the amount of rent for which lessors may in different cases be entitled to make a distress, it may be laid down as a general rule, that whatever can be properly considered as a part of the rent, may be distrained for, whatever be the particular mode in which it is agreed to be paid. So that where a person entered into possession of certain premises, subject to the approbation of the landlord, which he afterwards obtained, by agreeing to pay an advanced rent from the time he came into possession, it was determined that the landlord might distrain for the whole sum accrued before and after the agreement. (*i*) For on whatever day the tenant agrees that the rent shall become due, the law gives the landlord a power of distraining for it at that time. (*k*)

The rule for the distress therefore is, that it be in all respects conformable to the nature of the reservation and demise: so that, if there be two separate demises contained even in the same deed, a joint distress should not be made

be distrained for. Turner *v.* Lee, Cro. Car. 471. Darrel *v.* Wilson, Cro. Eliz. 644. Gough *v.* Howard, Bulstrode, part 3, p. 121. Co. Litt. 147 b. 7 Co. 25 a. Plow. 524, 5.

(*h*) Smith *v.* Mapleback, 1 Term. Rep. 441.

(*i*) Macleish *v.* Tate, Cowp. 784.

(*k*) Per Buller, Just. Buckley *v.* Taylor, 2 T. R. 600.

for the two several rents. (*l*) And if a tenant hold up to a certain period under one demise, and afterwards his possession is continued under another, although each demise be made only by parol, a joint distress should not be made for the rent accrued under the two demises. (*m*) But if a parol lease be made, *de anno in annum, quamdiu ambabus partibus placuerit*, and the lessee occupy during ten years, this by computation from time past, makes an entire lease for so many years; and if rent be in arrear for part of one of those years and part of another, the lessor may distrain, as for so much rent in arrear upon an entire lease, and is not obliged to make separate distresses, as for several rents due on different demises. (*n*)

From the foregoing rule it follows, that if there be no *demise*, there can be no right to distrain; and therefore where a party took possession under an agreement, that the owner *would* by indenture demise, at a certain rent fixed by the agreement, it was holden that until such indenture was executed, there was no power of distress, and that the owner had no remedy for the rent, but by action. (*o*) The same principle of course prevails in cases where the party has obtained possession otherwise than as tenant, as for example pending a negociation for a purchase or lease which is afterwards broken off, or as under tenant to a party whose lease has expired. In all such cases, the right of distress cannot attach, until by some act of the person in possession he has created or acknowledged a tenancy from year to year, and thereby admitted a demise. (*p*)

So likewise, and upon the same principle, a landlord can-

(*l*) Rogers *v.* Birkmire, Rep. temp. Hardw. 245. Taufield *v.* Rogers, Cro. Eliz. 340.

(*m*) Stanfield *v.* Hicks, Ld. Ray. 280.

(*n*) See Legg *v.* Strudwick, 2 Salk. 414. Birch *v.* Wright, 1 T. R. 380., and Roberts on Stat. of Frauds, p. 242. See Rep. temp. Holt 416.

(*o*) Hegan *v.* Johnson, 2 Taunt. 148.

(*p*) Doe d. Hollingsworth *v.* Stennett, 2 Esp. 717. Doe d. Knight *v.* Quigley, 2 Camp. 505. Right d. Lewis *v.* Beard, 13 East. 210. Doe d. Newby *v.* Jackson, 1 B. & C. 448. Morgan d. Dowding, *v.* Bissell, 3 Taunt. 65. Punton *v.* Jones, 3 Camp. 372. Burne *v.* Richardson, 4 Taunt. 720. Dunk *v.* Hunter, 5 B. & A. 322.

not after a verdict in ejectment, and before the issuing of the writ of possession, distrain for rent accruing subsequently to the day of the demise in the ejectment, for such verdict is conclusive that no tenancy then existed. (*q*) Such verdict however will not preclude the landlord from the benefit of the stat. 8 Ann. c. 14. s. 6, 7., for rent previously accruing; for the tenant's possession continues, although his tenancy is determined. (*r*)

For the rent of furnished lodgings.

A distress may be made not only for the rent of lands and houses, but also for the rent of any part of a house, as a single room or apartment therein, if it be the subject of a particular demise. And even if such an apartment be let furnished, a distress may be made for the whole rent reserved, because in contemplation of law, it issues wholly out of that part of the demised premises, which belongs to the realty. (*s*)

Double Rent.

There is one case, in which landlords or lessors are entitled to double the rent reserved, which is by virtue of the stat. 11 Geo. 2. c. 19. s. 18. enacting, that if any tenant shall give notice to his landlord, of his intention to quit the possession of the premises demised at a particular time, and shall not deliver up possession accordingly, he shall pay to his landlord double the former rent, for the whole time he shall hold the premises after the expiration of such notice; and that such double rent may be levied, sued for and recovered as the former single rent might have been. By the effect of which provision, landlords are now in all such cases entitled to make a distress for the double rent so incurred. (*t*)

Upon this statute it has been determined, that whether the tenant hold under a lease or a parol demise, it is equally within its provision; and that it is immaterial, whether the tenant's notice be in writing or by parol. (*t*) But if the landlord accept the single rent after the tenant has given no-

(*q*) Doe d. Holmes *v.* Darby, 8 Taunt. 538.

(*r*) Zouch d. Ward *v.* Willingale, 1 H. Blk. 311. Vide Duppa *v.* Mayo, 1 Saund. 287 c. note 16.

(*s*) Newman *v.* Anderton, 2 New Rep. 224.

(*t*) Timmins *v.* Rawlison, Bl. Rep. 533.

CHAP. III.

tice and hold over, it is a waver of his claim to the double rent, given by the statute. (*x*)

It is also said to have been held, that although where a demise is for a time certain, no notice to quit is necessary; yet if the tenant hold over, a notice in writing and demand of possession are requisite to entitle the landlord to double rent or value; but that such notice and demand may be at any time after the expiration of the term, if the landlord do not in the mean time acknowledge a subsisting tenancy: and that if the rent be reserved quarterly, and the demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent portion of that quarter. (*y*)

(*x*) Doe *v.* Batten, Cowp. 243.

(*y*) Cobb *v.* Stokes, 8 East. 358. From the report of this case, there does not seem to have been any notice given on the part of the tenant; and as the court appear to have considered the landlord's claim either to double value or double rent, as arising altogether upon his notice to quit, and demand of possession; it should seem, that this case falls wholly within the stat. 4 Geo. 2. c. 28., giving double value; and is quite independent of the stat. 11 Geo. 2. c. 19., entitling the landlord to double rent.

CHAPTER IV.

Of the Persons whose Goods are liable to be Distrained for Rent.

It may be considered as a general rule, that all goods found upon the premises demised to a tenant, are liable to be distrained by his landlord for rent; whether such goods belong to the tenant, or to other persons. (*a*) The necessity of this rule is obvious, when we consider by what varieties of fraud and collusion, the rights of a landlord would be liable to be defeated, if he were restricted in his remedy of distress to the goods of his tenant alone. The law has however in various instances, taken care to protect the property of strangers, if found on the premises without the knowledge or default of its owner, or brought there for the purposes of trade; which on account of its public benefit, is allowed to confer exemption on those things that are employed in its transactions.

It will be necesary hereafter to enter into a general inquiry respecting the nature of those things which may be taken as a distress: and then I shall have occasion to consider various cases of exemption arising out of the circumstances in which the goods to be distrained are found. But there are other cases of exemption, arising out of the right of property in the things to be taken as a distress. These will properly form the subject of our present inquiry.

Distress on the possession of the king.

The first of these privileged cases is that of the king, who is not only entitled to peculiar rights of distress, but also to peculiar exemptions from it: for as a distress was originally considered as a pledge, or security for satisfaction taken out of the hands of a wrong-doer, it being inconsistent

(*a*) Com. Dig. Distr. B 1.

CHAP. IV.

with the dignity of the crown, that the king should be treated as a wrong doer: it is a general rule, that no man can distrain upon the land in the possession of the king, whether upon office found or not. (*u*) So that if lands be seised into the hands of the king, even by false office, the lord of the seigniory cannot distrain; for the office, though false, is, whilst it continues to be in force, sufficient to preclude a distress. (*x*) So, if the king be entitled, by office found, to land out of which a rent-charge is issuing, the grantee of the rent cannot distrain upon the possession of the king: but if he grant over the land, then the rent may be distrained for, it not being extinguished, but only suspended by the possession of the king; and that possession ceasing, the remedy revives. (*y*)

Or of his grantee.

In many cases however, the distress is suspended, not only during the possession of the king, but even of his grantee; as where the land is once absolutely vested in the king; for although where the king enters without office or record, his patentee may be distrained upon; yet if he be entitled by office or record, and grant the land, no distress can be made upon his grantee. (*z*) This rule is, however, confined to a distress made in respect of rent issuing out of the land itself, and not of a rent-charge upon it; for by the office and record, he who was possessed of the land is ousted, and the land vested absolutely in the king, and therefore the lord whose title is destroyed cannot afterwards distrain upon the grantee. But a rent-charge is not destroyed by such office or record, being only suspended by the possession of the king, who cannot hold land subject to a charge; (*a*) and therefore the remedy for it is restored by the crown's parting with the possession of the land: (*b*) but if the rent-charge, as well as the land, were found by the office, it seems that the remedy of Distress would be absolutely gone. (*c*) So if the king were entitled to the wardship of the heir of his te-

(*u*) Bro. Distr. pl. 46.

(*x*) Ibid. pl. 77.

(*y*) Ibid. pl. 27. Anonymous, Saville, 125.

(*z*) Bro. Distr. pl. 47.

(*a*) Bro. Abr. Prerog. pl. 120.

(*b*) Bro. Abr. Trav. de office, pl. 32. Petition, pl. 9.

(*c*) Id. Entre congeable, pl. 125.

nant, and the land were charged with a rent, and the king committed to another the wardship *durante minore ætate*, it was held, that the grantee of the rent could not distrain upon the committee of the heir : (*d*) for the wardship was the king's, and whilst it continued, he might be considered as in possession by the hands of his committee.

Ambassadors, &c.

Another personal exemption from a distress, is created by stat. 7 Anne, ch. 12, by which the goods of all ambassadors, or other public ministers of any foreign prince or state, or the domestic servants of any such ambassador, or public minister, are privileged from distress as well as execution. (*e*)

Distress on persons having an estate in the land.

There are no other persons who are individually privileged from a distress, except those who are exempted from it on account of some interest in the land which they have jointly with the distrainor. Thus we have seen, (*f*) that among coparceners, if one have a rent issuing out of lands, which she holds with her sisters in coparcenary, she cannot distrain upon them before partition made, on account of their privity of estate. But there is no such privity between tenants in common, who may lease to each other their parts in the land, and distrain for the rent accordingly. (*g*)

On coparceners.

As persons seised of joint-estates, cannot in general sever them to the prejudice of others, it is said, that if coparcenary tenants make partition of their lands, without notice to the lord, he may still distrain upon them jointly, as before partition. (*h*)

Distress on joint-tenants.

It has already been observed, (*i*) that although joint-tenants may grant or lease the land held in joint-tenancy, and even destroy the joint-tenancy itself ; yet they cannot charge the land to the prejudice of their co-tenants, whilst the joint-tenancy continues : and therefore, that one joint-tenant is not liable to be distrained upon for a rent-charge

(*d*) Id. Distr. pl. 39.

(*e*) I am not aware that any cases of distress have arisen on this statute. See the other cases collected in Com. Dig. Ambassador B. and Hopkins *v.* De Robeck, 3 T. R. 80.

(*f*) Ante, p. 39.

(*g*) Bro. Distr. pl. 65.

(*h*) Iremonger *v.* Newsam, Latch. Rep. 261.

(*i*) Ante, p. 41.

CHAP. IV.

created by another. (*j*) But if one of several joint-tenants grant a rent-charge the grantor may distrain on the cattle of the grantor, or of a stranger being on the land. And like tenants in common joint-tenants may hold of each other, and be distrained upon accordingly; - the distress being confined to the part of the land so holden. (*k*) And they are liable to be distrained upon even for a rent-charge granted by another, if they hold by a later title. So that if one tenant grant a rent, and afterwards lease the land for years to his co-tenant, he will hold the land subject to a distress for the rent-charge. (*k*)

Distress for a rent-charge.

But where the tenant of the land holds by a title paramount the distress, he is not liable to it. So that, if a man be seised of a rent-charge by prescription, issuing out of a manor, he cannot distrain the cattle of the copyholders of the manor, if there be not a custom to warrant the distress: because they are in by prescription also, and their title is therefore as high as that of the owner of the rent. And it is said, that the law in this respect is still more clear if the rent be claimed by grant. (*m*) But where husband and wife were seised of a manor to them, and to the heirs of the husband, and the husband granted a rent and died, the rent being in arrear, and then the wife granted a copyhold to a stranger for life, and the grantee of the rent distressed the copyholder for the said arrears; the distress was held good because the copyholder came in under the charge; but it was said that if an ancient copyholder in fee, had surrendered to the wife to the use of a stranger; and she by her steward had granted the copyhold to such stranger accordingly he would have held it discharged of the rent. (*n*)

So if a man seised in fee, made a lease for life, and afterwards granted to another a rent-charge; it was formerly held that the grantee might distrain the cattle of the grantor, if they came upon the land, but that he could not distrain the goods of the tenant, who held by a title elder than the

(*j*) Ante, p. 40.

(*k*) Co. Litt. 186 a. Bro. Distr. pl. 69.

(*m*) 1 Roll. Abr. 669, 670.

(*n*) Dyer 270, pl. 23.

grant: (*o*) and it was said to be the same if the tenant held at will, unless the grant of the rent were considered as amounting to a determination of the will. (*p*) But these two last mentioned cases seem to have been derived from the principle of there being no privity between the tenant and grantee without attornment; which is now almost abolished by the stat. 4 & 5 Anne, c. 16., rendering attornment unnecessary, as to all rents created since that act, (*q*) where the the tenant is not liable to be prejudiced by a payment to the grantor, without notice of a grant of the rent.

Where a rent-charge can be distrained for, the remedy follows the land in the hands of any succeeding tenants; and therefore if one grant a rent-charge, and afterwards the land comes into the possession of several tenants, a distress for the whole rent may be made upon the possession of any one of them; for the entire rent issues equally out of every part of the land. (*r*)

On executors or administrators.

As a distress is considered in the nature of a remedy upon the land, if the tenant be dead, the goods of the deceased remaining thereon, may be distrained in the hands of his executor or administrator, for the rent accruing before and after his death. As likewise indeed may the goods of the executor or administrator, or of a stranger. (*s*)

Persons holding under an implied tenancy.

To render a person's goods liable to a distress for rent as a tenant, it is only necessary that a tenancy in effect should subsist, without reference to the manner in which it is created: the only question being, whether the relation between the parties does really constitute a tenancy. (*t*) So that, where a person granted lands to another, for a term of years, to secure an annuity, and the grantor continued to occupy the lands; it was held that the grantee might distrain for the arrears; the grantor's occupation being con-

(*o*) Brownl. pl. 1, 32.

(*p*) 1 Roll. Abr. 669.

(*q*) Long *v.* Buckeridge, 1 Stra. 106.

(*r*) 1 Roll. Abr. 671.

(*s*) Braithwaite *v.* Cooksey, 1 H. Bl. 465. Bolton *v.* Canham, Pollexfen 125. There are some cases in which an executor may wave a lease made to his testator, and relinquish the possession; but these can of course apply only to questions relative to actions on the contract, and not to the remedy of distress.

(*t*) Ante, p. 70.

CHAP. IV.

sidered as a mere tenancy under the grantee. (*u*) And if a lessee be a disseisor by a tortious entry, before the commencement of his lease, yet he is tenant from its commencement and his goods may be distrained for the rent. (*v*) Or if another disseise the lessee, and continue in possession, the lessor may distrain the disseisor's goods, for the rent reserved by the lease. (*x*) But where the goods, even of a former tenant, are rightfully on the land, they cannot be distrained for another's rent. Thus, a tenant at will, if quitting upon notice from his landlord, is entitled to the emblements or growing crops: and, therefore, even after they are reaped, if they remain on the land, for the purposes of husbandry, they cannot be distrained for the rent of the succeeding tenant. (*y*) And they are equally privileged in the hands of a vendee. (*y*)

Under-tenants.

If the goods of a stranger be, in many cases, liable to a distress for the rent due from the tenant, it is still more reasonable that it should extend to the goods of a person holding as an undertenant to the lessee; and whose occupation must indeed in general be considered with respect to the lessor, as the possession of his lessee. (*z*) And therefore the goods of such under-tenant are of course liable to be distrained during the continuance of the original lease. But it was in many cases necessary at the common law, that a lease should be completely surrendered before it could be renewed; and this was often prevented by the under-tenant's refusing to surrender their under leases; without which there could not be a renewal of the principal lease, out of which they were derived. To remedy this evil, the stat. 4 Geo. 2. c. 28. has enacted, that such renewal of the principal lease, shall be completely valid and effectual, without a surrender of the under leases; and that the original lessor, and his executors and administrators may distrain upon the under-lessees, for the rent reserved upon the renewed lease, as if

(*u*) Fairfax *v.* Gray, 2 Blackst. R. 1326.

(*v*) Macdonnel *v.* Welder, Stra. 550.

(*x*) Humphrey *v.* Damion, Cro. Jac. 300.

(*y*) Eaton *v.* Southby, Willes, 131.

(*z*) Bull *v.* Gibbs, 8 T. R. 327.

the original lease had been still subsisting, so far as such rent shall not exceed the rent originally reserved.

To exempt the goods even of a stranger (*b*) from a distress for rent if they are on the demised premises it is necessary that they should be there under peculiar circumstances. As first for the purpose of trade, in which case, on account of the public advantage of trade, they are privileged from distress. (*c*) Or, Secondly, that the place in which they are found, should be itself privileged for the like reason of general benefit; as a market, fair, or public inn. (*c*) Or, Thirdly, that they be on the premises without their owner's knowledge or default; as if a man ride to a place and there be taken sick, and so remain there for two or three days, yet his horse cannot be distrained. (*d*) So the goods of a succeeding tenant cannot be distrained for rent accruing in the time of a preceding tenant. (*e*) So likewise cattle straying into the land, through its defective fences, which the tenant or his landlord is bound to repair; in which case they cannot be distrained by *a lessor*, for rent reserved, until after notice given to their owner to remove them. But this restriction is said not to extend to the grantee of a rent-charge, nor to the lord distraining for an ancient rent, who may in all cases distrain the cattle after they have been *levant and couchant* on the land, unless their owner pursue and retake them before such distress be made. (*f*)

It was held, in the case of Fowkes *v.* Joyce, (*g*) that

(*b*) When the goods of an undertenant or a stranger are distrained for rent arreare, his remedy against the party from whom the rent is really due, is by action of assumpsit for money paid, if he redeem his goods by payment of the rent, or by a special action on the case, if he allows them to be sold under the distress. Vide Exhall *v.* Partridge, 8 T. R. 308. Moore *v.* Pyrke, 11 East 52. Graham *v.* Tate, 1 M. & S. 609. Dawson *v.* Linton, 5 B. & A. 521.

(*c*) Vide post. Chap. XI.

(*d*) 15 Ed. 2. Avowry, 216.

(*e*) Pollexfen, 130.

(*f*) 1 Roll. Abr. 668, 669. Gill *v.* Gawin, 2 Roll. Rep. 124. Kimp *v.* Crawes, 2 Lutw. 1577. S. C. Lord Raym. 168. Anonymous, 2 Leon. 7. Bl. Comm. 3. p. 8, 9. Harg. note (3) Co. Litt. 47 b.

(*g*) 3 Lev. 260. S. C. 2 Vent. 50. 2 Lutw. 1161.

CHAP. IV.

cattle going to London, and put into a close with the consent of the landlord and leave of the tenant to graze for a night, might be distrained by the landlord for rent; but the owner of the cattle was afterwards relieved in equity on the ground of fraud in the landlord, who had consented to the cattle being put into the close, and afterwards distrained them for rent, and he was decreed to pay all the costs both of law and equity. And it should seem that at this day a court of law would be of opinion, that cattle belonging to a drover being put into a ground with the consent of the occupier to graze only one night, in their way to a fair or market, were not liable to the distress of the landlord for rent. (*h*)

Of goods in the custody of the law.

It is a rule, that neither the goods of the tenant or a stranger can be distrained for rent, if they are already in the custody of the law: as if taken damage feasant, or under an extent or execution; unless such execution be already satisfied: (*i*) because in these cases, an interest in the goods is vested in third persons by the act of law, which cannot be divested, unless by their own default. As the cases falling under this rule, for the most part, resolve themselves into questions of property, it may be fit to consider them in this place.

The ancient rule of the common law, that goods already in the custody of the law, cannot be distrained, still remains perfectly unimpeached: but although the landlord cannot take such goods into his hands as a distress, yet a provision of the stat. 8 Anne, c. 14. has given him, to a certain extent, a lien on his tenant's goods when taken in execution. And it is now, principally with reference to that statute, that the question of property in such goods comes to be considered.

Stat. 8 Anne, c.14.

The provision alluded to, is contained in the 1st section of that statute, which enacts, that no goods, taken on any lands leased for life, years, at will, or otherwise, shall be taken in execution, unless the party at whose suit execution is sued, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent; and if

(*h*) Poole *v.* Longuevill, 2 Saun. 289. note 7.

(*i*) Harwell *v.* Burwell, Sir W. Jones, 456.

more, then the amount of one year's rent, due at the time of the execution. But by the 8th section of the same statute, it is provided, that the crown may levy, recover or seize any debts, fines, penalties or forfeitures, as if that act had not been made.

The effect of this exception is to leave the landlord's claim for rent upon goods taken in execution, at the suit of the crown, just as it stood at the common law. According to which, a debt due to the crown was always preferred to one due to the subject. So that where goods have been seized under an extent the landlord has no claim upon them for his rent until the extent is satisfied; and it is immaterial whether it is an extent in chief or an extent in aid, the latter being a prerogative process, and in effect operating for the benefit of the crown, although issued in aid of a subject. (*a*) Where also an extent is issued upon process of outlawry, the landlord is not entitled to the benefit of the statute, unless the outlawry is in a civil suit; in which case the *capias utlagatum* is to be considered only as a private execution, and within the provision of the statute. (*b*)

As the property in goods is not altered by the mere act of distraining,(*c*) the landlord will lose his remedy, if the goods are seized under an extent for the benefit of the crown, (*d*) after distress and appraisement but before actual sale. (*e*)

Upon that part of the statute, whiich gives to the landlord a right to his rent, as against an execution at the suit of a subject, several decisions have been made; by which it has been determined, Firstly, That a commission of bankrupt is not an execution within the meaning of the sta-

(*a*) Rex *v.* De Coux, 2 Price, 17.

(*b*) Rex *v.* Southerly, Bunb. 5. Greaves *v.* D'Acastro, Bunb. 194. Rex *v.* Pritchard, Bunb. 209. St. John's College *v.* Murcott, 7 T. R. 259.

(*c*) Rex *v.* Cotton, Parker 113, 133. Thurston *v.* Mills, 16 East, 254.

(*d*) Greaves *v.* D'Acastro, Bunb. 194. Vide Rex *v.* Hodder, 4 Price, 313.

(*e*) Rex *v.* Cotton, Parker 112. Rex *v.* Dale, Id. 141. And see Rex *v.* Pritchard, Bunb. 269.

CHAP. IV.

tute. (*f*) Secondly, As mentioned above, that a seizure under a process of outlawry at the suit of a subject is. Thirdly, that the statute only contemplates an existing tenancy, and does not apply where the tenancy has been determined before the execution is levied. (*g*) Fourthly, that this provision extends only to the immediate landlord of the premises, and not to the ground landlord upon an execution against the goods of an under-lessee; (*h*) but a trustee of an outstanding satisfied term, assigned to attend the inheritance is a landlord within the meaning of the act. (*i*) Fifthly, That the sheriff must know whilst in possession either by notice from the landlord (*k*), or otherwise, (*l*) that the rent is in arrear, for if he have not such knowledge it is not his duty to retain it. Sixthly, That the time when such knowledge is acquired, whether before or after removal, or before or after sale, is immaterial, provided the proceeds remain in the hands of the sheriff. (*m*) Seventhly, That if the goods seized are not removed or sold by the sheriff, so as to transfer the property therein, but the tenant pays the debt, the landlord is not entitled. (*m*) Eighthly, That the landlord is entitled if the sheriff after notice sell or remove some of the tenant's goods, although he may leave other of his goods on the premises. (*n*) Ninthly, That the landlord must be paid his rent without any deduction for the sheriff's poundage on the execution; (*o*) but, that the sheriff may deduct such costs, as were incurred before notice given to him of the rent due to the landlord. (*p*) Tenthly, That by the landlord accepting an undertaking for the rent, and consenting that the goods shall be sold, he waives the benefit of the statute even if such undertaking be a void one. (*q*) Eleventhly, That if there be two executions

(*f*) Lee *v.* Lopes, 15 East 230.

(*g*) Hodgson *v.* Gascoigne, 5 B. & A. 88.

(*h*) Bennett's case, Stran. 787.

(*i*) Colyer *v.* Speer, 2 B. & B. 67.

(*k*) Waring *v.* Dewberry, Stra. 97. S. C. Fortesc. 360. Smith *v.* Russell, 3 Taunt. 400.

(*l*) Andrews *v.* Dixon, 3 B. & A. 645.

(*m*) Arnit *v.* Garnett, 3 B. & A. 440.

(*n*) 1 Sellon, 535.

(*o*) Gore *v.* Gofton, Stran. 643.

(*p*) Henchett *v.* Kempson, 2 Wilson, 140.

(*q*) Rothery *v.* Wood, 3 Camp. 24.

on the tenant's goods, the landlord is not entitled to have a year's rent out of each, but must demand out of one of them his whole rent under the statute. (*r*) Twelfthly, That if the sheriff do, after notice, wrongfully remove the goods, he is not liable for the rent, beyond the amount of the goods sold, after making such deductions as may be allowed for expenses. (*s*) Thirteenthly, That the landlord can only claim for rent due at the time of taking the goods, and not for rent which accrues after the taking, and during the continuance of the sheriff's possession. (*t*) Fourteenthly, That the rent to which the landlord is entitled, is that due for the year immediately preceding the execution; and therefore, if the tenant hold under a lease at one rent, and afterwards hold under a second demise, at another; the landlord cannot demand the amount of a year's rent unpaid upon the expired lease. (*u*) Fifteenthly, That the landlord, upon removal of the goods without payment of the rent, may have either an action on the case upon the statute against the sheriff, or proceed against him in a summary way by attachment, (*x*) but he cannot maintain an action against him for money had and received. (*y*) Sixteenthly, That a bill of sale is a removal of the goods within the statute. (*z*) Seventeenthly, That after demand made, either an executor or administrator of a deceased landlord, may have the like remedies upon this statute, as a landlord himself: (*a*) but, that it does not extend to an administrator, to whom administration was granted after the goods sold under the execution; and who consequently could not make a demand of the rent, whilst they were in the hands of the sheriff. (*b*)

(*r*) Ded *v.* Saxby, Stra. 1024.

(*s*) Henchett *v.* Kimpson, 2 Wils. 140.

(*t*) Hoskins *v.* Knight, 1 M. & S. 245. Vide also Gwilliam *v.* Barker, 1 Price, 274. and Peacock *v.* Purvis, 2 B. & B. 362.

(*u*) Cook *v.* Cook, Andr. 219.

(*x*) Darling *v.* Hill, Cas. temp. Hard. 255. 1 Sell. Prac. p. 535.

(*y*) Green *v.* Austen, 3 Camp. 260.

(*z*) West et Ux. *v.* Hedges, Barnes, 211. Vide also Smith *v.* Russell, 3 Taunt. 400.

(*a*) Henchett *v.* Kimpson, 2 Wils. 140. Twells *v.* Colville, Willes, 377. Chace *v.* Chace, Fortesc. 359. Palgrave *v.* Windham, Stra. 214.

(*b*) Waring *v.* Dewberry, Stra. 97.

And lastly, That in an action on this statute, against the sheriff, for taking away the goods without leaving the rent due to the landlord according to the act, the declaration needs not state all the particulars of the demise; but if it do, they must be proved as stated, or the plaintiff will be nonsuited. (z)

Of goods the custody of which has been abandoned.

It should here be observed, that if the sheriff after seizure, abandon the possession of the goods, the landlord's right of distress revives; and the mere locking up by the sheriff of his warrant in the drawer of a table, which amongst other things he had seized, and taking away the key, without leaving any person in possession, has been held to be such an abandonment. (a) So likewise growing crops, seized and sold under an execution, are protected from distress during their growth, and for a reasonable time after their severance; yet if the purchaser allow them to remain beyond such reasonable time, they will lose the protection of the law, and be distrained on like the goods of any other stranger being on the land. (b)

By the stat. 56 Geo. 3. c. 50., passed for the purpose of regulating the execution of legal process so as to be consistent with good husbandry, it is enacted, that the sheriff shall not carry off, or sell for the purpose of being carried off, from any lands, let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever, nor after notice, any hay, grass or

(z) Bristow *v.* Wright, Doug. 665.

(a) Blades *v.* Arundale, 1 M. & S. 711. According to the report of this case, the sheriff's officer having entered the house, laid his hand on a table, saying, "I seize this table," and then locking up his warrant in the drawer of the *same* table, took the key and went away; but it does not appear that he seized the table in the name of *all the goods*, Cole *v.* Davis, 1 Ld. Raym. 724., or whether the table was included in the goods distrained by the landlord, which are stated generally to be "part of the goods so permitted by the sheriff's officer to remain in the apartment."

(b) Parslow *v.* Cripps, Com. Rep. 204. Eaton *v.* Southby, Willes. 131. Peacock *v.* Purvis, 2 B. & B. 263. et vide Gwilliam *v.* Parker, 1 Price 277.

grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables being the produce of such lands, where according to any written agreement with the landlord, the same is to be expended thereon, but shall sell the same under certain regulations, to be there used and expended according to the custom of the country, or according to the written agreement, as the case may be; and by the sixth section of the statute all crops and produce so sold, and all cattle and implements of husbandry employed and used in and about the same, are protected from distress.

Distress on the goods of a bankrupt.

The remedy of distress for rent arreare was not affected, by any statutory provision upon the bankruptcy of the tenant, previous to the commencement of the operation of the new code of bankrupt laws, introduced by the statute 6 Geo. 4. c. 16. By sec. 74. of that statute, the right of the landlord to distrain, after an act of bankruptcy by his tenant, in respect of rent accruing prior to the date of the commission, is limited in amount to one year's rent, and it is immaterial whether the distress be before or after the suing out of the commission, and whether the landlord have or have not notice of the act of the bankruptcy; and he must come in as a creditor for the residue of his demand. But rent accruing subsequently to the date of the commission is not affected by that statute, and the rights of the landlord with respect to the rent accruing before the date of the commission, for which he is still at liberty to distrain, are as ample as before the statutory enactment. The only limitation is in the amount. He may therefore distrain upon the goods for such rent, so long as they remain upon the premises, notwithstanding the possession of the messenger, an assignment by the commissioners, and even a sale by the assignees, for these acts only change the property in the goods, and do not affect their liability to distress. (*c*)

The landlord will also be entitled to this remedy, although the demise be after the act of bankruptcy committed, (such demise not being fraudulent) and the rent in respect of which the distress is made be reserved payable in advance;

(*c*) Ex parte Plummer, 1 Atk. 103.

for it is competent to a bankrupt to take a demise, and the rent being due in respect of such demise may be distrained for according to its terms. (*a*)

If however the landlord neglect to distrain, he can only come in *pro rata* with the other creditors; (*b*) and in a case where a landlord had proved the amount of his debt under a commission he was considered as having thereby waived his right of distress, and was restrained from proceeding in replevin against a party who had purchased the goods of the assignees, and was residing with them in the house of the bankrupt. (*c*)

If the landlord distrain, and the tenant replevy, and the goods are sold by the assignees, and the landlord afterwards have judgment for a return; his only remedy is on the replevin bond, for he has no lien on the goods in the hands of the vendee. (*d*)

(*a*) Buckley *v.* Buckley, 2 T. R. 600. In this case the landlord had not exercised his right of distress; but had purchased goods at the sale of the bankrupt's effects, and claimed to retain the amount in discharge of his rent. The arguments turned on the right to distrain, and it seems to have been taken for granted that if the landlord had a right to distrain, he had a right to retain the money. Why such a conclusion followed from such premises does not appear.

(*b*) Anonymous, 1 Atk. 102. Ex parte Descharmes, Id. 103.

(*c*) Ex parte Grove, 1 Atk. 104.

(*d*) Bradyll *v.* Ball, 1 Bro. Ch. Ca. 433.

CHAPTER V.

Of the Time limited for making a Distress for Rent.

Of the Demand of Rent.

It is of course requisite that the rent for which a distress is made, should be due according to the terms of the demise, before the time of making the distress. But a previous demand of the rent is not always necessary, for much less strictness is required with respect to a demand of the rent, for the purpose of a distress, than for that of re-entry, for a forfeiture accrued by its non-payment. Thus, if there be a clause in the lease, that the lessor may distrain for the rent, "*being lawfully demanded,*" notwithstanding the latter restrictive words, the lessor may distrain for the rent when due, without any demand. And so it would be in the grant of a rent-charge. (*a*) For the remedy of distress is not in destruction of the estate, but only taking a pledge for the payment of the rent. And the very making of the distress is considered as a legal demand. It is however in such cases advisable to make a demand, although not absolutely requisite to do so. (*b*) But if instead of the general words, "*being lawfully demanded,*" (which are satisfied by the very distress itself) the reservation be such as to require a special demand; as if the clause were, that if the rent were behind, it should be demanded at a particular place, *not on the land;* or be demanded *of the person of the tenant;* then it seems a special demand would be necessary to support a distress. (*c*)

When a demand of rent is necessary, it must be made by the landlord himself, or his immediate agent; for an agent cannot delegate his authority to a third person. (*d*)

(*a*) Kind *v.* Ammery, Hutt. 23.

(*b*) Bac. Abr. Condit. O. 2.

(*c*) Browne *v.* Dunnery, Hob. Rep. 208. Kidwelly *v.* Brand, Plowd. 69. Vide contra, Kind *v.* Ammery, Hutt. 23. et Borroughe's case, 4 Co. 72, 73.

(*d*) Pim *v.* Greville, 6 Esp. 95.

If there be a rent so specially reserved, together with a *nomine pœnæ*, payable at different times, a separate demand for each must be made at such respective times. (*d*) And even if there be a general reservation of the rent, and a *nomine pœnæ*, it should seem that the rent ought to be demanded to create a forfeiture of the penalty, although without such demand the distress may be good for the rent. (*e*)

When a rent is reserved payable on a particular day, it is the duty of the tenant, to be on the land on that day ready to pay the rent, and he must be on the land at such a convenient hour before sunset, as to enable the landlord to count the money; and he must also remain there until the last moment when the rent could be paid. (*f*) If the landlord is not there to receive the rent, still as it continues to be due, his remedy by distress is not gone, but he should demand the rent upon the land before he distrains, although in strictness it seems that the distress itself is a sufficient demand. (*g*) If however the tenant tender the rent, on or after the day when it becomes due, to his landlord personally, the landlord cannot afterwards distrain without demanding the rent from the tenant *in person*, and also *upon the land;* for the tenant is not bound to seek the person of his landlord, or to pay the rent off the land. (*h*)

It may be observed that these rules with respect to the demand, seem to apply equally to the cases of rent-service, or rent-charge, although the latter may be in the hands of an assignee. (*i*)

But in all cases of a distress for rent, if the tenant do, upon the land, tender the arrears of rent due, a distress cannot afterwards be made (*j*) without a subsequent demand

(*d*) Brown *v.* Dunnery, Hob. 208. Kidwelly *v.* Brand, Plowd. 69.

(*e*) Howell *v.* Samback, Hob. 133.

(*f*) Tinckler *v.* Prentice, 4 Taunt. 549.

(*g*) Cranley *v.* Kingswell, Hob. 207. Horne *v.* Lewin, Lord Raymond, 639, 641. Fox *v.* Vaughan, Hetley, 86. Maund's Case, 7 Co. 114. Co. Litt. 202 a.

(*h*) Baker *v.* Spain, Hob. 8. F. N. B. 69. g. n. a.

(*i*) Maund's Case, 7 Rep. 114.

(*j*) Six Carpenters Case, 8 Rep. 147. 2 Inst. 107.

and refusal. *(k)* And if the tender be made after the distress before it is impounded, the landlord cannot lawfully detain it. *(l)* In order therefore to give the tenant an opportunity of preventing the distress, by a tender of the rent, it is held that a distress cannot be made in the night-time, either for a rent-service or rent-charge. *(m)* And where the rent is of a particular kind, as that of the render of a rose, a distress for it cannot be made until the season when the roses are blown, for before that time it cannot be considered as due. *(n)* For the period at which the rent may be considered as due, and a distress be made for it, depends upon the nature of the contract: and therefore where, by the custom of the country, half a year's rent becomes due upon the tenant's entry on the land, a distress may be made for it immediately. *(o)*

Rent when due.

As rent is not strictly payable until the last minute of the natural day, a distress cannot be made before the next day, for until that time, it is not absolutely due. *(p)*

It is not however sufficient to authorise a distress, that the rent for which it is made, should be due for as we have seen, *(q)* it is also necessary that a privity of estate should subsist between the person distraining and the tenant. So that in many cases, if the landlord or lessor has parted with his reversion in the premises demised, or done any other act, which destroys the privity of estate between himself and the tenant, his remedy of distress is gone.

Distress after expiration of the term at the Common Law.

Upon this principle, it was held at the common law, that for rent reserved upon a lease, the lessor could not distrain after the determination of the term; for thereby the privity of estate was destroyed: *(r)* and therefore, for rent due on

(*k*) Cranley *v.* Kingswell, Hob. 207.

(*l*) Six Carpenter's case, 8 Co. 147. 2 Inst. 107.

(*m*) Co. Litt. 142. a.

(*n*) Litt. Sect. 129.

(*o*) Buckley *v.* Taylor, 2 T. R. 600. And see Macleish *v.* Tate, Cowp. 784.

(*p*) Duppa *v*, Mayo, 1 Saund. 287. Harg. n. (6) on Co. Litt. 47. b.

(*q*) Ante. p. 35,

(*r*) Pennant's Case, 3 Rep. 64. Bro. Distr. pl. 74. Co. Litt. 47. b. 13. Hen. 4. 31. It is said in an anonymous case in Keilw. p. 96. that it was *clearly* held by the

the last day of the term, the lessor could not distrain because the term was ended. *(s)*

This rule extended to a rent-charge also and to its *nomine pœnæ*; *(t)* but if a man leased for life, reserving rent, and then granted to another and his heirs this rent, with a power of distress, and afterwards the lessee for life died, yet the grantee could distrain for the arrears. *(u)*

Under statute 3 Ann. c. 14.

This rule of the common law was productive of great injury; to remedy which it was provided by the stat. 8 Anne, c. 14. s. 6 & 7 that any persons having rent in arrear upon any lease for lives, years or at will, ended or determined; may after the determination of such lease, distrain for the arrears, as they might have done if the lease had not been ended: provided, that such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and the possession of the tenant, from whom such arrears are due.

This statute is not confined to a tortious holding over; nor to a holding over of the whole of the premises: and therefore, where the tenant held over a part by consent, it was held that the landlord might distrain upon that tort for arrears of rent due for the whole. *(v)*

It has also been held, that the possession of the tenant under this statute, is not limited to the personal possession

whole Court of Common Pleas, that if a man makes a lease for *one* year rendering a certain rent, and after the year has passed the termor holds over, he may be distrained upon for the rent, notwithstanding the year has passed. As it was about this period of our history, that tenancies from year to year, as they now exist, first began to be acknowledged, it is not improbable that this decision had reference to a holding of that nature, and remains one of the first cases upon record in which hat species of holding was recognized. It is difficult upon any other ground to discover the principle of the decision. It is opposed to every older authority, and is directly at variance with the stat. of Anne, and it seems to have excited the surprise of the Reporter himself, who refers to previous authorities, all of which however relate to leases for years.

(*s*) Co. Litt. 47. b. Dalis. Rep. 13.

(*t*) Tutter *v.* Fryer, Winch. 7.

(*u*) Dalis. Rep. 42.

(*v*) Nuttall *v.* Staunton, 4. B.&C. 51.

of the tenant himself, but that the possession of his administratrix is equally within the act: and consequently the landlord may within the period prescribed, distrain upon her for the arrears due before and since the death of the intestate. (*x*)

Where a tenant is entitled to an off-going crop, the tenancy continues as to that part of the land upon which the crop is growing, notwithstanding the determination of the term; and consequently the landlord may distrain upon such crop, for the rent of the out-going tenant, without reference to the stat. of Anne, and although the tenant shall have quitted possession of the farm. (*y*) And this right will continue, although the crop be gathered and placed in a barn upon the farm, until the expiration of the time allowed by the custom of the country, for the out-going tenant to get in and dispose of his off-going crop; (*z*) and it should seem also, as the rights of the landlord cannot be affected by any agreement between the in-coming and out-going tenants, that such right of distress for the old rent will continue during the whole of the above period, although the in-coming tenant may have bargained for and paid the value of the crops.

Distress on Goods fraudulently removed.

The second section of the same statute enacts, that if the lessee, whether for lives, years, at will or otherwise, shall fraudulently or clandestinely carry off his goods, from the premises demised, in order to prevent the landlord's distress; the landlord may, within five days afterwards, distrain them as if they had still continued on the premises; provided, they be not sold within that time for a valuable consideration and without notice. And this term of five days is further extended by the stat. 11 Geo. 2. c. 19. to thirty days; and both the tenant so offending, and his abettors, are made liable to pay to the landlord, double the value of the goods so fraudulently conveyed away. (*a*)

(*x*) Braithwaite *v.* Cooksey, 1 H. Bl. 465.

(*y*) Beavan *v.* Delahoy, 1 H. Bl. 5. Boraston *v.* Green, 12 East. 71, 81.

(*z*) Lewis *v.* Harris, 1 H. Bl. 7. *in notes.* Vide Davis *v.* Connop, 1 Price, 53.

(*a*) Vide post. chap. 6. as to the place in which the goods so re-

CHAP. V.

Of making several distresses for the same rent.

As various distresses are vexatious to the tenant, a landlord cannot, if there be a sufficient distress upon the premises, divide an entire rent into parts, and distrain first for a parcel, and afterwards for the residue of the same rent; but such second distress will be illegal. (*b*) If however he distrain for the entire rent, but by mistake in the value of the goods distrained, take an insufficient distress, it seems that a second distress for such deficiency will be lawful; although there was sufficient goods on the premises to have answered the whole demand at the time of the first taking. (*c*) It is clear he may take such second distress, upon goods subsequently coming on the premises, if in the first instance he distrain all the goods then thereon, and for the entire rent, and the goods do not cover the amount of the rent; and it may be questioned whether he has not such right to distrain a second time, if he at first distrain only for parcel of the rent, provided the parcel so distrained for be equal in amount to the value of the goods then upon the premises, but this point is doubtful. (*d*)

In the stat. 17 Car. 2. c. 7. passed for the protection of landlords, in cases where after a distress has been replevied, the tenant has become nonsuit, or has had judgment given against him by demurrer, by simplifying the mode of proceeding in such cases in manner there pointed out, an express provision is made for enabling landlords in all cases within that statute, to take a second distress, if the cattle (*e*) originally distrained, shall not be found of full value to answer the arrears due. (*e*)

Where different portions of rent become due at different times, several distresses may be made for them, even though all the portions be due before the first distress, and that distress be made for the portion of rent which last accrued. (*f*)

moved may be taken; and post. chap. 12. for the manner of proceeding in making such distress.

(*b*) Wallis *v.* Saville, 2 Lutw. 1536.

(*c*) Hutchings *v.* Chambers, 1 Burr. 579, 589.

(*d*) Anon. Cro. Eliz. 13. Moore 17.

(*e*) 17 Car. 2. c. 7. s. 3. all the sections of the statute speak of *goods* or *cattle* distrained, except the third, which is confined to *cattle* only.

(*f*) Per Browne, J. Moore's Rep. 7. Palmer *v.* Strange, 1 Lev. 43. S. C. 1 Sid. 44.

CHAPTER VI.

In what Place a Distress for Rent may be made.

As the remedy of distress was considered, at the common law, to be particularly connected with the land, it was generally restricted, either to the land out of which the rent issued, or at least to the seigniory of the lord to whom the rent was due.

Distress by the king.

This restriction did not however extend to the king, who is by his prerogative entitled to distrain for rent on all the lands of his tenant, and in some cases, even of an under-tenant: and is also entitled to take a distress in the highway; (*a*) because every highway is the seigniory of the king. And in some cases, the grantees of the crown have the same privilege as the king himself.

Distress out of the lord's fee, or in the highway.

By the ancient common law it was always held, that a lord could not distrain for a rent or service out of his fee or seigniory; (*b*) for otherwise, the distress must have been considered, not as belonging to the land, but following the person of the tenant; from which this inconvenience would have followed, that the tenant might have been distrained in one manor, for the rent or service which he owed in another, and to a different lord. This restriction of the distress to the seigniory, did not however, of course, apply to the case of a rent-charge; (*b*) for that necessarily carried the distress to the land, on which it was charged; and the rent was due to the grantee, not in respect of a seigniory, but of the grant: and the distress thus ensuing the nature of the grant, if the rent were granted out of one manor with a clause of

(*a*) 2 Inst. 131. (*b*) 2 Inst. 131.

CHAP. VI. distress in another, the distress might be made on the latter. (*i*) The king's highway was also by the ancient common law, considered as a place privileged from distress. The lords however frequently took upon themselves to make such distresses as were forbidden by the common law; to prevent which, the statute of Marlebridge, in affirmance of the ancient common law, enacted, that no man should, for any manner of cause, take distresses out of his fee, nor in the king's highway, or common street; but only the king, or his officers having authority to do the same. (*k*)

A distress in the highway is therefore unlawful, although the highway itself be within the seigniory or fee of the lord who makes the distress. (*l*) But this rule is confined to the first taking of the distress; for if the lord coming to distrain, see the beasts within his fee, and before he can distrain them they are chased into the highway, he may distrain them therein. (*m*)

The restriction of distraining within the fee of the lord, is also confined to the first making of the distress. For, if the lord come to distrain cattle which he sees within his fee, and the tenant or any other person, in order to prevent the lord from making the distress, drive the cattle into some other place out of his fee; the lord may make fresh pursuit after the cattle, and distrain them. But if the lord have no view of the cattle whilst on his fee, although the tenant drive them off purposely to prevent a distress; or if the cattle themselves, after the view, go out of the fee; or if the tenant, or any other person, after the view, remove them for any other purpose than that of preventing a distress, the lord cannot distrain them; and if he do, the tenant may make rescue. (*n*)

The principle established, both by the common law and the statute of Marlebridge, is, that the distress shall follow the rent: and consequently be confined to the land, out of which it issues. Therefore, if two pieces of land be let by two seperate demises, although both be contained in one

(*i*) Bro. Abr. Charge, pl. 17.

(*k*) Stat. Marlebr. c. 15. And see post. Chap. 13.

(*l*) Co. Litt. 160 b.

(*m*) 2 Instit. 132.

(*n*) Co. Litt. 161 a.

lease, a joint distress cannot be made for them: for this would be to make the rent of one issue out of the other: (*o*) but, where lands lying in different counties are let together by one demise, at an entire rent, and it does not appear that the lands are seperate from each other; it shall be intended that they are contiguous, and one distress may be made for the whole rent. (*p*) And where a rent is charged upon land, which is afterwards held by several tenants, the grantee may distrain for the whole, upon the land of any one of them; because the entire rent issues out of every part of the land.(*q*) But if a man seised of an advowson, make a lease thereof rendering rent; or if he demise a manor to which an advowson is appendant, yet he cannot distrain upon the glebe; for in this case, the rent issues out of the advowson, or out of the manor; but not out of the glebe, in which the lessor had no estate.(*q*)

Distress on the land out of which the rent issues.

Upon any part of the land, out of which the rent issues, a distress may be made, either for a rent-service or rent-charge,(*r*) And if there be a house on the land, a distress may be made in the house, if the outer door be open;(*s*) or if the window be open, a distress may be taken out at it.(*q*) And if the outer door be open, an inner door may be broke open for the purpose of taking a distress. (*t*) But the lessor cannot enter a house to distrain, if the door be not open, nor even a barn, (*u*) nor throw down any gate or inclosure to get at a distress.(*x*)

But he may make an aperture in a partition belonging to himself and in his own occupation, and so enter the premises and (*y*) distrain; and if a distress be once lawfully made, and the distrainor be afterwards forcibly expelled, he may it seems, with the assistance of a peace officer break open the outer door, in order to renew the distress. (*z*)

(*o*) Rogers *v.* Birkmire, Rep. temp. Hardw. 245. S. C. Stra. 1040.

(*p*) Walker *v.* Rumbal, Ld. Raym. 55. S. C. 12 Mod. 76.

(*q*) 1 Roll. Abr. 671.

(*r*) Com. Dig. Distr. A. 3.

(*s*) Vide Semayne's Case, 5 Co. 91.

(*t*) Anonymous, Comb. 17. Browning *v.* Dann, Rep. temp. Hardw. 168.

(*u*) Vin. Abr. Distr. E. 2.

(*x*) Co. Litt. 161 a.

(*y*) Gould *v.* Bradlock, 4 Taunt. 563.

(*z*) Farncombe *v.* Pinch, Esp. Ni. Pri. 382. M. S.

CHAP. VI.

In a recent case it has been held by the Court of Common Pleas, (z) that a barge attached by a rope to a wharf, on the river *Thames*, may be distrained for rent arrear in respect of such wharf and premises adjoining. It is said by Lord C. J. Best in his judgment, that the short ground of the decision is, that the premises would be useless without the privilege of attaching barges; and that if so the privilege forms part of the subject of demise. Park, J., observes, that all the trade of London would be at end if the law were otherwise; for that goods could not be landed if the owners of wharfs had not an exclusive right to attach vessels to their wharfs. And Burrough, J., states, that the abuttal in the lease (viz. to the north on the river Thames) did not decide the case, for that there might be evidence to shew the enjoyment of a right beyond.

By the statute 8 Ann. c. 14. s. 8., landlords are enabled to take as a distress for rent, any cattle or stock belonging to their tenants, feeding upon any common appendant, or appurtenant to the premises demised.

Distress of Goods clandestinely removed.

In case the tenant's goods be clandestinely removed off the demised premises, in order to prevent a distress; we have already seen, that by the 2nd section of the stat. 8 Anne, c. 14. the person to whom the rent is in arrear is authorized to follow and distrain them within five days after such removal; which time is extended by the stat. 11 Geo. 2. c. 19., by the first and second section of which it is provided, that in case the tenant shall so remove his goods, the landlord may, within thirty days after such removal, take and seize them wherever they shall be found, as a distress for the rent; unless before that time *bona fide* sold to a purchaser. And by the 7th section of the same statute it is

(z) Buszard *v.* Capel, 4 Bing. 137. The plaintiff in this action being nonsuited, commenced a second action in the Court of King's Bench, and on the trial of that cause it was specially found, that *no interest in the soil of the river Thames passed by the demise; but that an exclusive privilege of mooring barges against the demised premises did pass.* Whether such privilege passing to the lessee confers on the lessor a power of distress, where he has no interest in the soil, will shortly be solemnly argued on the special verdict before the Judges of the above Court.

enacted, that where any goods fraudulently or clandestinely carried away by any tenant or lessee, or their servant, agent, or other person aiding therein, shall be put in any house or other place, locked up or otherwise secured, so as to prevent such goods from being distrained for rent; the landlord or lessor, or his bailiff, may in the day time, with the assistance of the constable or other peace officer of the hundred, parish, or place, and in case of a dwelling house, oath being also first made before some justice of the peace, of a reasonable ground to suspect that such goods are therein: break open and enter into such house or place, and take and seize such goods for the arrears of rent; as he or they might have done by virtue of that or any other former act, if such goods had been put in any open field or place.

By the words of the statute, the goods must be fraudulently or clandestinely removed, and for the purpose of "preventing the landlord from distraining the same for arrears of rent reserved, due or made payable." In the case of Watson *v.* Main, (*a*) it was ruled by Eyre, C. J., that in order to bring the case within this statute, the removal must be *after* the rent became due; but in a subsequent case, (*b*) where the goods were removed on the night of September 28th, the rent becoming due on the following day, Lord Ellenborough, C. J. expressed considerable doubt upon the point, saying, "where goods are fraudulently removed from the premises in the night, to prevent the landlord from distraining upon them for arrears of rent to become due the next morning, the case certainly comes within the mischief intended to be remedied by 2 Geo. 2. c. 19., and there is some ground to contend that it comes within the provisions of the statute."

Whether the removal be fraudulent or clandestine, is a question for the jury; and in a case where the tenant having become bankrupt, the assignees, (after having elected to become tenants of the demised premises, by ordering the cows to be milked thereon) had the cows driven off very

(*a*) Watson *v.* Main, 3 Esp. 15.

(*b*) Furneaux *v.* Fotherby, 4 Camp. 136.

early in the morning, for the alleged reason that the pasture was bare, the jury found such removal to be for the purpose of avoiding a distress for rent then in arrear, and therefore fraudulent. (*c*)

The statute applies to the goods of the tenant only; (*d*) and the penalty inflicted by the 7th section on persons assisting tenants in such fraudulent removal, does not extend to a creditor of the tenant, who with the tenant's assent takes his goods, and removes them from the premises for the purpose of satisfying a *bonâ fide* debt; although he so takes possession, knowing the tenant to be in distressed circumstances, and under an apprehension that the landlord will distrain. (*e*)

(*c*) Welch *v.* Myers, 4 Camp. 368.

(*d*) Thornton *v.* Adams, 5 M. & S. 38.

(*e*) Back *v.* Meats, 5 M. & S. 200.

CHAPTER VII.

Of a Distress for Services, Suit, Reliefs, and Customs.

Of the Nature of the Ancient Services.

THERE is perhaps no part of the law respecting the subjects of a distress, which has undergone a more considerable change, than that which relates to the services due from the tenant to his lord. Under the ancient system of English tenures, these services and their several incidents were as numerous as they were oppressive. To the principal of them, namely, tenure by knight-service and grand serjeanty, not only homage and fealty were incident, but also aids, reliefs, primer seisin, wardships, marriage, fines for alienation and escheat. For the greater part of these the lord was entitled either to seize for a forfeiture, or to make a distress: and our early writers on the law of distresses abound with enquiries into the various cases in which the lord was entitled to distrain for the subtraction of his tenant's services.

Altered by several statutes.

These enquiries, however, were gradually rendered less numerous and important by the operation of the statute of *quia emptores terrarum*,(*a*) and the statutes *de prærogativa regis*;(*b*) which prevented the mesne lord, and tenants *in capite*, from making subinfeudations of their lands. This necessarily limited the number and variety of legal services; but so many still remained due to the crown and to the lords of ancient seigniories, that the consideration of them formed a very important part of the law both of tenures and of distress, until the reign of King Charles the Second; when, by a single statute,(*c*) all the military tenures were entirely abolished, and converted into free and comon socage.

By the stat. 12 Car. 2. c. 24.

By that statute it was enacted, that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages should be taken away and discharged. And that all fines for alienations, seizures, and pardons for alienations, tenures by homage, and all charges incident to, or arising by reason of wardship, livery, primer seisin, or ousterlemain, or tenure by knight's service, escuage, and also aids for marrying the lord's daughter, and knighting his son, and all other charges incident thereunto, should be likewise taken away and discharged. And that all tenures by knight's service *in capite*, or otherwise, and by socage *in capite*, and the fruits and consequences thereof, should be taken away and discharged; and all tenures of the king, or any other persons, be turned into free and common socage:(*d*) provided, that the act should not take away any rents certain, heriots, or suits of court belonging to any tenure taken away or altered thereby; or other services incident or belonging to common socage, or the fealty and distresses incident thereunto. And that such relief should be paid in respect of such rents, as is paid in the case of the death of the tenant in common so-

(*a*) 18 Edw. 1.

(*b*) 17 Ed. 2 c. 6. 1 Ed. 3. St. 2. c. 12. and 34 Ed. 3. c. 15.

(*c*) 12 Car. 2 c. 24.

(*d*) Mr. Hargrave, note (1) on Co. Litt. 85 a. observes, that this statute descends into particulars with a redundancy of words. Indeed its redundancy is so great, as almost to obscure the sense of some of its clauses.

cage. And that it should not take away tenures in Frankalmoign, or subject them to any other or greater services than they then were, nor alter or change any tenure by copy of court roll, or any services incident thereunto. Nor take away the honorary service of grand serjeanty.

The effect of this statute is therefore to reduce all freehold tenures, except tenure in Frankalmoign and by grand serjeanty, to tenure by free and common socage; but to preserve copyhold tenures, and their several incidents unimpaired. The tenures in Frankalmoign and by grand serjeanty have however since the statute become obsolete, and it will therefore only be necessary to enquire into the nature of those services which are still incident to free and common socage, and to copyhold tenures.

Of Tenure in Socage.

Tenure in socage was formerly of two kinds, villein socage and free socage. The former consisted of services that were certain, but of a base kind; the latter, of such as were both certain and honourable: and it is to this latter tenure of free and common socage, that the ancient military tenures are reduced by the statute.(*e*) But the nature even of the tenure by free and common socage is in some degree changed; for lands in socage might formerly be held by homage and various other services which are taken away by the statute of Charles II. And as socage tenure itself is thereby reduced to that single species of it which is denominated free and common socage, in contradistinction to the villien socage, which consisted of baser services; all those predial services which formerly belonged to the latter tenure, are consequently taken away by the statute. So that, perhaps at this day, fealty, heriots, and suit of court, are the only services which can belong to socage tenure: the effect of the statute being not only to abolish all the other incidents of this tenure which then existed, but also to prevent the future reservation of any of those services which were taken away by the statute itself: for by the 4th section it expressly enacts, that tenures created by future grants, even of the king, shall be deemed to be free and common socage only.

(*e*) 2 Bl. Comm. 61, 79, 81.

Of Fealty.

The fealty of socage tenure, and the distress incident to it, are however expressly preserved by the 5th section; and to fealty a distress is not only incident of common right, but absolutely inseparable from it, (*g*) unless by the act of law.(*h*) And the fealty itself is inseparable from the reversion.(*g*)

Fealty is said to be incident to all manner of tenures, except tenure in Frankalmoign, and tenancy at will, unless of copyhold lands. So that if a man make a lease for life, or for years, without reserving any rent, the lessor having the reversion, the lessee shall do fealty to him; (*i*) for otherwise there would be no evidence of the tenure.(*k*)

But although fealty be thus incident to freehold, as well as copyhold tenure; the great revolution that has been effected by the abolition of the ancient military services, has rendered fealty nearly obsolete, except for copyhold lands: and even for them, it is generally respited on the admission of the tenant, there being sufficient evidence of the tenancy, in the entries on the court rolls of the manor.(*l*) The oath of fealty must however still be taken, if required, by the tenant in person, although she be a feme covert, but it cannot be demanded of an infant tenant, for his nonage incapacitates him from taking the oath of fealty. (*l*)

The service of fealty generally ensues the nature of the tenant's estate. So that, among coparceners, the eldest only shall do fealty for herself and sisters: but it seems that joint-tenants shall do fealty jointly. Tenants in common, having several estates, must of course do for them several services.(*m*)

Of Heriots.

A second incident of tenure, preserved by the statute of 12 Car. 2. is that of heriots. Of which, Lord *Gilbert* says, that "it is now the best beast of the tenant; but anciently "was taken out of the *militiæ apparatus*. It was a device "first introduced to keep a conquered nation in subjection, "and to support the public strength and military furniture

(*g*) Co. Litt. 151 b.
(*h*) Id. 153 a.
(*i*) Litt. Sect. 131, 132.
(*k*) Id. Sect. 130.
(*l*) Watk. on Copyh. 1,265.
(*m*) Co. Litt. 67 a. b.

CHAP. VII.

"of the kingdom, by taking, on the death of the tenant, his "best armour. Hence it became part of the services arising "from the tenure, and therefore, to be distrained for as other "services. This as the military service declined, was "turned into something of private profit to the lord, and "instead of the *militiæ apparatus*, he took the best horse, "ox, or cow; and the same remedy was continued, as "where the heriot was paid in the habiliments of war." (o) Heriots may however consist of other things besides the cattle of the tenant, for any personal chattel, as a jewel or piece of plate, may be due to the lord for a heriot, according to the nature of the reservation. (p)

Heriots are of two kinds, heriot-service and heriot-custom. The former is due only in respect of a particular reservation, the latter is due to the lord by virtue of an immemorial custom established in a manor or other peculiar franchise; and does not require any reservation to support the lord's claim to it. Both the heriot-service and heriot-custom may belong equally to freehold or copyhold tenure; but our inquiries will be confined to heriot-service alone; for heriot-custom, although it may be seized, cannot be distrained for: (q) so that even a prescription to distrain for it, if it be eloigned, is bad. (r)

Heriot-service, is that heriot which is never due without special reservation: (s) and it was anciently held, that such a reservation could be made only on the death of a tenant in fee-simple. (t) But this rule perhaps applied only to a tenure created before the statute of *Quia emptores Terra-*

(o) Gilb. Distr. 9, 10.

(p) 2 Bl. Comm. 442.

(q) Bro. Abr. Hariot, pl. 2, 6, 7. 2 Inst. 132. Odiham v. Smith, Cro. Eliz. 590. Hungerford v. Haviland, Latch. 38. S. C. 3 Bulst. 325.

(r) Bro. Abr. Hariot, pl. 9. It is indeed repeatedly said in the books, that heriot-custom can never be distrained for; but it should seem, that a distress for it would be good, if there were also a custom for making the distress. See what fell from Lord Hardwicke in Rogers v. Birkmire, Rep. temp. Hard, p. 247. And from Crew, C. J., in Hungerford v. Haviland, 3 Bulstr. 325.

(s) Co. Copyh. 24.

(t) Bro. Abr. Hariot, pl. 5.

rum; (*u*) for after that statute it was clearly otherwise; it being observed by Lord *Coke*, that heriots were *seldom* reserved upon a less estate than an estate of inheritance. (*x*) And it has since been held, that a heriot may be reserved on a lease for lives, or for years determinable on lives, and a distress be made for it in respect of the reversion: but it seems that it should be so reserved as to become due before the expiration of the lease, for then the privity between the lessor and lessee is determined. (*y*) If it be reserved on a grant in fee made since the statute of *Quia emptores Terrarum*, it cannot be considered as a service, because no service can be created since that statute upon such a grant, but it is held to be in nature of a rent, and as such to be recovered by action or distress, but not by seizure. (*z*)

I have already observed, that for heriot-custom the lord may seize, but cannot distrain; and for heriot-service, it was formerly held, that he might distrain, but could not seize. (*a*) It is however now determined, that for heriot-service, the lord may distrain, or seize at his election. (*b*) But the latter remedy can be resorted to, only in those cases in which the heriot can properly be considered as a service, rather than a rent; and therefore does not, as we have before seen, apply to any reservation upon a grant in fee since the statute of *Quia emptores Terrarum*: but where the service is more ancient than the statute, it may of course be seized. As however the remedy of seizure does not immediately belong to our present inquiry, I shall only observe upon it, that on the death of the tenant, the heriot vests immediately in the lord, who may therefore seize it as his own property wherever it is to be found, even in the hands of a vendee; unless it were sold in market-overt: but

(*u*) Wms. note (1) on Lanyon *v.* Carne, 2 Saund. 168 a.

(*x*) Co. Copyh. p. 24.

(*y*) Osborne *v.* Sture, 2 Lutw. 1368.

(*z*) Edwards *v.* Mosely, Willes, Rep. 192.

(*a*) 8 Heny. 7, 10. Bro. Hariot. 7.

(*b*) Woodland *v.* Mantel, Plowd. 96 a. Major *v.* Brandwood, Cro, Car. 260. Peter *v.* Knoll, Cro. Eliz. 32. Odiham *v.* Smith, Id. 500.

CHAP. VII. he can seize the beast of no one but the tenant, and therefore cannot take one belonging even to an assignee of the lease. (*d*).

In some manors there is a custom for the commutation of the heriot into a sum of money; (*e*) but as this must be considered to be a heriot-custom, it is not distrainable. If however a sum of money be reserved in lieu of heriot-service, then it becomes a rent, and may be distrained for accordingly. (*f*)

As heriot-service is due only upon reservation, it depends wholly on the nature of the contract, and may be reserved on any event, or at any period. There are however some general rules which belong to such reservations. Thus where the heriot was reserved on the death of a tenant, if the tenant were disseised of freehold lands, the heriot would still be due on his death, and not on that of the disseisor, unless a descent were cast which tolled the entry of the lord: and then it would be due on the death of such disseisor, or his heir. And in copyhold lands, which do not admit of disseisin, if the surrenderor die before the admission of the surrenderee, it will be payable on the death of the former, because he dies tenant to the lord. (*g*) So, if the tenant be a female, and marry, it is due not on the death of the husband, but of the wife; but if she die in her husband's lifetime, the heriot is lost, for she cannot leave a personal chattel. (*h*) If the husband take as tenant by the curtesy, or a woman by free bench, the whole of the copyhold, then heriots are due on their respective deaths as tenants. (*i*) And as joint-tenants and coparceners make but one tenant to the lord, the heriot is not due until the death of the survivor; but among tenants in common who have several estates, it is due on the death of each. (*k*) And a copyhold property, which in the hands of a single owner,

(*d*) Com. Dig. Copyhold, K. 20.

(*e*) Watk. on Copyholds, 2, 127.

(*f*) Lanyon *v.* Carne, 2 Saund. 165.

(*g*) Watk. on Copyhold, 2, 146, 147.

(*h*) Id. 151. and see Shaw *v.* Taylor, Hob. 176.

(*i*) Watk. 152, 153.

(*k*) Id. 147—149.

pays but one heriot, but pays several if divided amongst several owners, shall pay again but one heriot if it become united in the person of a single owner. (*l*)

As a heriot is due in respect of the tenancy of land, where the legal estate in the lands holden is vested in a trustee, the heriot is due on his death, and not on that of the *cestui que trust*. (*m*)

Where the heriot is reserved upon alienation, it must of course depend upon the description of the alienation of the deed: but I agree with a learned writer in thinking, that it must generally be taken to mean, such an alienation as not only changes the possession, but determines the tenancy: and therefore, that where reserved upon a grant in fee of freehold lands, it will not be due upon aliening only a portion of the fee, which does not destroy the original tenancy. Although it is otherwise in copyholds, where the alienee becomes tenant, not to the alienor, but to the lord. (*n*)

Heriot-service, like rent, is incident to the reversion; and therefore, will descend with the reversion to the heir, or pass with it to a grantee. (*o*) Thus, where a lease of part of a manor was made to *A*. and *B*. for lives, rendering rent, and a heriot reserved upon the death of each of the *cestui que vies;* and afterwards the manor was leased for years, and the lessor died, it was held, that the heriot should go along with the reversion, (or as it should rather be termed the possibility of reverter) to the lessee of the manor. (*p*) Where a heriot is reserved upon a lease for years, it does not become due unless the lease has taken effect in possession; and therefore, when reserved upon a second lease, to commence after the determination of a former one, before which the lessee in the second lease on whose death the heriot was payable, died, it was determined by the opinions of three justices, that it was not due. (*o*)

(*l*) Garland *v*. Jekyll, 2 Bing. 273.

(*m*) Trinity College Cambridge *v*. Browne, 1 Vern. 441.

(*n*) See Watk. 156—158.

(*o*) Lanyon *v*. Carne, 2 Saund. 63.

(*p*) Bishop of Gloucester *v*. Wood, Winch, 47. S. C. Id. 57.

CHAP. VII.

Heriot-service may, in some cases, be multiplied, and in others be extinguished. For it is considered to be like an entire rent, as the render of a horse or sword, where, if the tenant alien a part of the lands demised, the rent shall be multiplied, and paid for each part: (*t*) therefore, if there be three or four alienees of land held by heriot-service, a heriot will be due on the death of each: and after the tenant has, by his own act, multiplied the services, he cannot afterwards reduce them; for if he purchase back the part of the land which he aliened, the multiplied services will still continue. (*t*)

But, as the act of the tenant may multiply the services, so the act of the lord may extinguish them, as by an unity of possession; for if the lord purchase even a part of the land, the whole service is thereby extinct. And if the whole land come to the lord by descent, or by escheat; there the service will also be extinct; because the tenancy is at an end: but if a part of the land come to the lord, by the mere act of law, it should seem, that in that case, the service will remain for the residue. (*t*)

If the heriot be not rendered to the lord, or be eloigned, he may distrain for it, not only the goods of the tenant, but even those of a stranger, if within the manor: but he cannot out of the manor, distrain the goods even of the tenant himself. (*u*)

A distress for heriot-service, like a distress for rent, must be confined to that which is due upon a single reservation. And therefore, if a tenant hold two parcels of land, upon which heriots are *severally* reserved, although both reservations may be contained in one deed, a joint distress for both the heriots could not be supported. (*x*)

When a distress was made for a heriot, the distrainor was

(*t*) Bruerton's case, 6 Rep. 1. Talbot's case, 8 do. 105.

(*u*) Woodland *v.* Mantel, Plowd. 96. Austin *v.* Bennet, 1 Salk. 356. Major *v.* Brandwood, Cro. Car. 260.

(*x*) See Syliard's case, reported in 1 Bulstr. 101. as cited and observed upon by Lord Hardwicke in Rogers *v.* Birkmire, Rep. Temp. Hardw. 247.

entitled, at the common law, to detain the cattle or goods until the heriot was paid, or the distress replevied. And now as it should seem, in all cases where the heriot is considered to be *a rent, rather than service*, the distress, if not replevied, may be sold under the authority of the act of 2 Wm. and Mary, c. 5. (*x*) but where the heriot is properly *a service*, it cannot fall within the operation of that statute.

Suit of Court.

A third incident of tenure preserved by the statute of Charles II, is that of suit of court. This is of two kinds, namely, suit-real and suit-service. The first is by common law and of common right, being the attendance which persons owe to the court-leet, or to the county court, to which they are obliged in respect of their commorancy within its jurisdiction. For this service, if neglected, the defaulter is liable to be punished by fine or amerciament, which may be levied by distress. But the consideration of this species of distress belongs to a future part of our enquiry. The other, namely, suit service, is that attendance which is due to the court-baron by the freehold tenants of a manor; and to the customary court, by its copyhold tenants; in order to form the jury, or as it is termed, the homage of those courts. For the neglect of these services, the lord is entitled to distrain on the goods of the tenant who makes default. (*y*)

The Court Baron.

To the court-baron, which consists of the freeholders of the manor, every freehold tenant is bound to do suit. But this duty must be shewn, either by the terms of the feoffment, or by prescription, which is the presumptive evidence of it: for otherwise, the tenant cannot be distrained for his suit. (*z*) Anciently, the freeholder was compellable to do this suit in person; but this was productive of great inconvenience, for he might be tenant of different manors, holding courts on the same day; (*a*) and it was therefore enacted, by the statute of Merton, that every freeman owing suit to the country, trything, hundred and Wapentake, or to the

(*x*) Wms. note (1) on Lanyon *v.* Carne, 2 Saund. 168 a.

(*y*) Anonymous, 3 Salk. 382.

(*z*) Stat. Marlbr. 52 H. 3. c. 9.

(*a*) 3 Instit. 99.

CHAP. VII. court of his lord, might make his attorney to do those suits for him.(*b*) This authority must be given by power of attorney under seal, to be allowed by the steward of the court: and when duly authorized, such attorney may, in general, perform all the suit-service of the freeholder in the court-baron, except that of sitting there as a juror on the homage:(*c*) which restriction also extends to a female tenant, who may be a freeholder, but cannot sit as a juror in the court.(*d*) If, however, she marry, her husband must sit on the homage in her stead.(*e*)

The statute of Marlebridge, cap. 9. provides for the suit that shall be done by some persons holding joint estates; and enacts, that "if any inheritance whereof but one suit is "due, descend unto many heirs, as unto parceners, whoso "hath the eldest part of the inheritance, shall do that "one suit for himself, and his fellows, and the other co-"heirs shall be contributaries according to their portion, for "doing such suit. And if many feoffees be seised of an in-"heritance, whereof but one suit is due, the lord of the fee "shall have but one suit."

With respect to parceners, Lord *Coke* observes, that the act is to be understood, after partition, for before that time, the eldest hath not *enitiam partem;* and before partition, no contribution can be made. But in the king's case, all the coparceners must do suit, as well after partition as before, and so must their several feoffees; for the act extends not to the king. And in the case of a common person, if the eldest will not do the suit, the lord may distrain the other coparceners.(*d*) If one coparcener make a feoffment of her part, or a man be tenant by the curtesy of one part of the land, yet one suit shall only be done by the elder coparcener.(*f*) So if one be a feoffee or tenant by the curtesy of the *enitia pars,* he shall do the suit alone.(*d*) But if a joint-tenant make a feoffment of his part; his feoffee shall

(*b*) Stat. 20 H. 3. c. 10.

(*c*) 2 Inst. 99, 100. S. V. Hunt v. Bourne, 1 Salk. 341.

(*d*) 2 Instit. 119.

(*e*) Watk. on Copyh. 1. p. 273.

(*f*) F. N. B. 159.

do a several suit by himself, although the other joint-tenants shall do but one suit by the statute of Marlebridge. Tenants in common are however bound to do several services and several suits.(*i*)

The statute of Marlebridge extends only to those cases of joint estates, in which the tenant doing the whole suit may have contribution from his co-tenants; and therefore, if one holding by suit made several feoffments of different parts of the land, by the operation of the statute the lord was entitled to suit only from one of the tenants, and the others were bound to make contribution: (*k*) but if the tenant enfeoffed several persons *jointly*, of different parts of the land, in this case no contribution was required, for only one suit was due from all the joint feoffees. (*k*)

Suit of court may be due not only from the original tenant of the land, but also from his widow holding in dower, but she cannot be distrained to do such suit for her land, if the heir have sufficient land in the county for the distress. And if the tenant in dower be distrained, she may have a writ *de exoneratione Sectæ*. (*l*)

Suit of court, like other services, may be extinguished by the act of the lord. So that, if the lord purchase any part of the land, the whole suit is gone: and so it is, if such part come to the lord even by act of law, as by descent, because in that case there wants contribution, as much as if it came to him by act of the party. (*k*)

As the king cannot hold land of a subject, no suit or service can ever be due for land in the hands of the king, or of his grantees. And therefore, if the king have lands by forfeiture, or escheat, and lease them for life, or at will, or grant them in tail, the lord cannot distrain the king's lessee or grantee. And so it was anciently of the lands of an heir in the wardship of the king, whether the lands were in the hands of the king, or of his committee. (*l*) For by the seisin of the king, it seems that the services are not

(*i*) F. N. B. 162.

(*k*) Bruerton's case, 6 Rep. 1.

(*l*) F. N. B. 158, 159.

Chap. VII. merely suspended, but destroyed: and therefore, if a man hold land charged with suit to the hundred by prescription, and enfeoff the king of parcel of the land, Lord *Hale* doubts whether the whole suit be not thereby extinguished. (p)

Of the Customary Court.

As the court-baron is composed of the freeholders of the manor, so is the customary court of the copyhold tenants; who upon due notice being given to them of holding the court, are obliged to attend although they may not be resident within the manor. (q) And as all the copyholders are bound to attend, a woman copyholder must do suit, if she be sole, or a widow: but if under coverture, her husband must perform it for her. So a widow must do suit for her freebench, and the husband for his curtesy. But it should seem, that an infant shall not do suit, for he cannot do it in person; and it does not appear that he can perform it by guardian. (r) As copyholders are not within the statute of Marlebridge, they cannot perform their service by attorney, but they may make an essoign as *de malo lecti*, if unable to attend. (s)

This suit, like other services, follows the nature of the tenant's estate: and therefore, among coparceners, or joint-tenants, one shall do suit for all; but tenants in common shall do several suits for their land. (t)

There is another species of suit-service, which was anciently very general, and has not yet become obsolete; which is, an obligation on the part of the freehold and customary tenants of a manor, to grind their corn at the lord's mill. For the subtraction of this service, there are two remedies: the one, by the writ of *Secta ad Molendinum*, the other by distress. This suit may be claimed either by prescription, or tenure: and therefore, it was formerly held, that a man might claim it by prescription, even from the villeins of a stranger. (u) And in the case of the king, it is said, that if he hold a manor even by wardship, within which there is a

(p) F. N. B. 159. note (d).

(q) Sir John Braunche's Case, 1 Leon. 104.

(r) Watk. Copyh. Vol. 2. p. 174, 175.

(s) 1 Leon. 104. ut supra.

(t) Vide ante. p. 101.

(u) F. N. B. 122.

mill, all the tenants are bound to grind their corn at it; although not otherwise bound to do so by tenure or prescription. (*x*) Where this suit is due from tenants, it should be claimed in respect of their tenure, but where claimed from resiants, it must be prescribed for. (*y*)

Of other Copyhold Services.

Anciently, it was usual for copyholders, as well as freeholders, to perform various corporal services, as ploughing the lord's land, &c. and such services, if belonging to copyhold tenure, are preserved by that clause of the stat. 12. Car. 2. which generally exempts copyholds from the operation of the act. But time has nearly abolished, what in this respect the statute has preserved; for there are now very few instances of performing such services even for copyhold lands. In some places however, it is said, that the tenants still assemble with their teams, &c. on certain days which are usually called boon, or due days; but the ceremony is chiefly formal. Where such services are still really due, distress is incident to them, as to other copyhold services. (*z*)

Reliefs.

Another incident of tenure preserved by the statute 12 Car 2. is that of relief. For, although the reliefs due upon the ancient military tenures, were by that statute abolished, together with the tenures to which they belonged, yet the fifth clause which exempts from the operation of the act, rents certain, heriots and suits of court also provides that such relief shall be paid in respect of those rents as is paid on the death of the tenant in common socage. Upon this part of the statute, one of the learned editors of the first institute, Mr. Hargrave makes the following remarks: "From "this clause it seems that there can be no relief out of "lands which the statute changed into socage, unless where "a quit rent is also payable; and the reason of thus ex-"pressing the act will appear by considering, that a year's "rent is the relief for lands holden by common socage, and "consequently is never due out of lands which are not sub-"ject to a rent, unless by special custom, or express re-"servation." (*a*) And afterwards, upon that passage, in

(*x*) Hale: note (*b*) ibid.
(*y*) Id. note (*c*) ibid.
(*z*) Watk. Copyh. 2, 184.
(*a*) Note (1) on Co. Litt. 85 a.

CHAP. VII. which Lord Coke observes, that where the tenure is by fealty only, no relief is due, Mr. Hargrave says, "The reason "is plain: socage relief being a year's rent, cannot be cal- "culated, if annual rent is not payable. See ante 85 a. note "1. But, as by custom, or by express reservation on cre- "ating the tenure, a payment wholly different from, and "unconnected with the yearly rent may be due for relief; "so it may be presumed, that by the same means, a relief "may be payable where there is no yearly rent; because "the relief is ascertained, without reference to a yearly "rent, in both cases equally. See Kitch. on Co. ed. 1592. "s. 103. Here, it may not be amiss to advert to some "other differences between the several kinds of relief pay- "able by socage tenants. 1st, The proper socage relief, "that is the relief incident to the tenure by socage, by the "general custom of the realm, is a year's rent, and conse- "quently, can never be payable, except where there is an "annual rent; but the improper socage relief, that is, the "relief due either by special custom, or by express reserva- "tion, may be more or less than the annual rent, or may be "payable where there is no annual rent. 2dly, The socage "relief by common law is only payable on a descent, and by "a natural person: but the two other reliefs may be due "where the tenant comes in by purchase, or where he takes "as a sole corporation by succession. Ante 84 a. 2 Roll. "Abr. 517, 518. 3dly. If the relief claimed is one at com- "mon law, it is presumed to be due till the contrary ap- "pears; that is, unless it can be proved, that the relief "hath been released, or that the tenure was reserved with "an express exemption from relief. 3 Lev. 145. Vin. Abr. "Evidence, A. b. 28, pl. 5. But if the relief be claimed by "special custom, or special reservation, the *onus probandi* "must necessarily fall upon the lord. 4th. If the relief is "by the common law, it is merely a fruit incident to the "service; but if the relief is by express reservation, it "is a part of the service. 5th. If the relief is by the "common law, or by special reservation, the remedy by "distress follows of course; but it is said that for relief by

"special custom, distress is not warranted without a pre-"scription. W. Jo. 190." (*b*)

To this concise but comprehensive view of the doctrine of socage relief, I shall add but a few observations.

The resemblance of the relief to the heriot is at first sight, so striking, that they have been frequently confounded together; although in fact they differed essentially, the heriot being generally due on the death of the tenant, or on the determination of the tenancy; the relief only on the accession of the heir. (*c*) And it was therefore a rule of the common law, (as above stated) that a purchaser should never pay a relief, So that if a man aliened in fee to his eldest son, and died, his son being of age, no relief was due from him, because he took by purchase; (*d*) but if it had been a gift in tail, and the reversion had descended, he should have paid a relief in respect of the reversion. The relief was in general considered as being due upon the accession of every heir, and therefore was due from the female, as well as the male heir.

If a tenant in socage hold, at his election, either by the render of a horse or twenty shillings rent, he may pay which he pleases for a relief: but if he neglect to render either of them, then the lord may distrain for which of them he will. If however the render is uncertain in value, as if the tenure be to attend on his lord, or to pay ten shillings, there the relief must be the ten shillings: because the value of the other service cannot be ascertained. (*e*) If the rent be reserved, not annually, but every two or three years, still the whole amount of it is due for the relief. And as at the common law, the lord could not have the wardship of the body or land of the heir of socage tenure, the relief is considered to be due immediately on the death of the ancestor, and the lord may at once distrain for it. (*f*) In the case of joint inheritances, as in estates in copar-

(*b*) Harg. note (2) on Co. Litt. 93 a.

(*c*) Watk. on Copyh. 2, 128. and Harg, note (1) on Co. Litt. 83 a.

(*d*) Roll. Abr. 2, 517.

(*e*) Co. Litt. 90 a.

(*f*) Id. 91 a.

CHAP. VII. cenary, only one relief is due on the accession of the joint heirs. (*g*)

Lastly, it is the opinion of Lord Coke, that for a relief the lord may distrain, but cannot have an action of debt: and that his executors and administrators may have an action of debt for it, but cannot distrain. (*h*)

Of the seisin of services.

It has been before observed, that at the common law, a seisin both of rents and services was necessary to entitle the lord to distrain for them. And that the stat. 32 Hen. 8. c. 2. rendered it necessary to allege such seisin within fifty years; but the stat. 11 Geo. 2. c. 19. s. 22. which enables the lord distraining to avow generally without setting forth the grant, tenure, demise or title, extends not only to rents, but to services, heriots and reliefs. (*i*) And as this statute has been considered to have been made for the purpose of preventing tenants from contesting the titles of those under whom they hold, (*k*) it should seem that since that act, it is not competent for a tenant to dispute the seisin of his landlord distraining for any species of reliefs or services.

Customs.

There are various customs in respect of which a distress may be made. The greater part of these belongs to manors and copyhold lands; but whether belonging to freehold or copyhold tenure, no custom can be sufficient to support a distress, unless it possess all the legal qualities essential to a good custom. And therefore, the great question to be considered in all cases is, whether the custom upon which the distress is founded, be a good custom according to those principles of law which determine the validity of customs in general. But as it would greatly exceed the limits of this work to inquire minutely into the law of customs, I shall only mention the general legal requisites of a custom, and afterwards take notice of a few cases respecting them, which more immediately relate to the law of distresses.

(*g*) Anonymous, 3 Leon. 13.

(*h*) Co. Litt. 47 b. 83 a. Sed vide Lord North's case, 2 Leon. 179., and Hungerford *v.* Haviland, 2 Roll. Rep. 371.

(*i*) Reliefs are mentioned in this statute, but they certainly were not within the statute of Henry 8. See 2 Inst. 95.

(*k*) Syllivan *v.* Stradling, 2 Wils. 208.

First. A custom must be immemorial. 2ndly. It must have been continual, that is continued without interruption with respect to the right, although there may have been cessations in the exercise of it. 3rdly, It must be peaceable, that is, so commonly acquiesced in, that it's existence may appear to have been generally admitted. 4thly. It must be reasonable, that is, agreeable to that artificial rule of reason, which may be deduced from the general principles of the law. 5thly. It must be certain, that is certain and defined in itself, or capable of being reduced to such certainty, by a reference to something by which it may be ascertained. 6thly. It must be compulsory, that is, so fixed and established with respect to the right, as not to be left to the option of those who are subject to it. (*l*)

As every custom depends upon an immemorial usage, it is a necessary consequence, that customs which are repugnant to each other, cannot be good: for inconsistent usages destroy each other's prescription: but where customs are not inconsistent, it is sufficient that they be immemorial, although they may not be coeval. (*m*)

It is also a general rule, that all customs must be subject to the prerogative of the crown, and every custom inconsistent with it, is therefore void, at least with respect to the king. (*n*)

Where a custom is repugnant to law, it is absolutely void; where it is in derogation of the common law, it is construed strictly; and even where the custom may be good as between the parties, it is not permitted to alter or destroy the rights of other persons, who are strangers to it. Thus, a custom that the lord may seize as a heriot, the best beast of every person dying within his manor, that may be found there, is void. For as between the lord and a stranger, such a custom could not have a lawful commencement; but as between the lord and his tenants, such a custom may be good. So, if the lord prescribe to have forty shillings of

(*l*) Bl. Comm. V. 1. 76—8.

(*m*) Lovelace's case, 1 Salk. 203. Vide Kingsmill *v.* Bull, 9 East, 185.

(*n*) The case of Tanistry, Dav. Rep. 33 b.

every stranger who breaks his pound, such a prescription is void, and binds his tenants only. But a prescription to have the beasts of a stranger, which are lying upon his land all the day, to fold upon his land in the night, is good: because in this case, the stranger has a compensation. (*o*) So a custom for a township to send a constable to be sworn at the leet of the lord of a manor, or be fined, may be good; but as it is against common right, a distress cannot be made for it without a custom to support it. (*p*) So a custom in a manor for all the copyholders living remote from it, to pay a certain sum in excuse for doing suit there, was held to be good: for here as custom gives the suit, it may consequently qualify it. (*q*)

But even as between the lord and his tenants, a custom must have those general legal requisites, which belong to a good custom. And therefore, a custom that no commoner shall put his cattle upon the waste, before the lord, is void: because it leaves it to the will of the lord, whether the commoner shall ever enjoy his common, or not. (*r*) So is a custom that every tenant who marries his daughter without the licence of the lord, shall pay a fine. (*s*) Or a custom, that the lord may detain a distress taken upon the demesnes of the manor, until a fine at his will be paid for the damage: (*r*) for both these customs are unreasonable. And upon the same principle, a custom for the homage to assess a compensation, in lieu of a heriot due from an incoming tenant, has been held to be bad; as being made by persons interested, and without a rule to ascertain the assessment. (*t*)

Those customs are favoured, which are beneficial to the public; such for instance, as tend to promote trade or navigation. And therefore, a custom for a corporation to dis-

(*o*) Parker *v.* Combleford, Cro. Eliz. 725.

(*p*) Pierson *v.* Ridge, 1 Ventr 105.

(*q*) Isaac *v.* Ledgingham, 1 Ventr. 167.

(*r*) The case of Tanistry, Dav. Rep. 32.

(*s*) Litt. Sect. 209.

(*t*) Parkin *v.* Radcliffe, 1 Bos. & Pull. 282.

train the tackle of a ship, for the non-payment of toll due to them in consideration of repairing a port, is good. (*u*) So also a custom for freemen and proprietors of ships to dig ballast, is good. (*x*) And it was also said to be a good custom within a manor adjoining to the sea, that in case of a wreck, cast upon the manor between the flux and reflux of the sea, in consideration of the lord's taking care of the sick, and of the goods, he should have the best anchor and cable of the ship. (*y*) But where the custom was for the lord to have such anchor and cable of any ship that should strike upon the shore of the manor, and afterwards get off, it was determined to be void, for there was no proportion between the damage and the recompence. (*z*)

(*u*) Vinkinstone *v.* Ebden, Carth. 357. Mayor and Commonalty of London *v.* Hunt, 3 Lev. 37.

(*x*) Mayor and Commonalty of Lynn Regis *v.* Taylor, 3 Lev. 160.

(*y*) Simpson *v.* Bithwood, 3 Lev. 307.

(*z*) Geere *v.* Burkensham, 3 Lev. 85.

CHAPTER VIII.

Of a Distress for Fines and Amerciaments.

THE imposition of fines for acts of contempt or disobedience, is incident to a variety of courts. And such fines are recoverable according to their different natures, by *capiatur*, *levari*, or distress. I shall however principally confine my inquiries to such as are usually recovered by distress. And therefore shall pass over, among others, copyhold fines paid on alienation or descent; for which an action of assumpsit will lie, but which cannot be distrained for, because they are only a debt due from the person of the tenant upon admittance, and not a charge upon the land. (*a*)

(*a*) Watk. on Copyh. 1, 321.

CHAP. VIII.

Fines imposed in the tourn or leet.

The fines for which a distress is most usually made, are those imposed in the sheriff's tourn, or the court leet. "There is however (says the Lord Chief Baron Gilbert) "this distinction to be observed in fines imposed by a court "leet. They are either imposed by a steward for a con-"tempt to the court; and this is absolutely necessary for "the support of the authority and dignity of the court, "within the boundaries of its duty: or else, they are im-"posed as a punishment for those crimes which are conusa-"ble by the court. But where by custom the court hath "jurisdiction to impose a fine for a thing not originally "within the jurisdiction, but only acquired by custom, in "such case, as that particular custom gave the leet a power "to impose the fine, so the custom only can create the right "of distress." (*b*) And therefore it is said, "That a dis-"tress is incident of common right to every fine and amer-"ciament in a sheriff's tourn or court leet; whether the "same belong to the king, or a subject, if the offence for "which they were imposed be of common right incident to "the jurisdiction of such courts: but if such offence were "only the neglect of a duty created by custom; it is ques-"tionable, whether it do not require the like custom for a "distress, though the duty be of a public nature; but if it "be for the private benefit of a subject, it seems clear, that "no distress is incident to it, without a special custom. (*c*)

Difference between fines and amerciaments.

It is however necessary to distinguish fines from amerciaments, with which they are often confounded. For although an amerciament, as well as a fine, is said to be the act of the court; yet it is the act of the court by the intervention of the jury; whereas, a fine properly so called, is the act of the court alone.

It is observed by Lord Coke, that fines are usually imposed on strangers, but amerciaments upon the officers or suitors of the court: (*d*) the principal distinction between them however, seems to be, that fines are usually imposed

(*b*) Gilb. on Distr. p. 18.
(*c*) 2 Hawk. P. C. 60.
(*d*) Griesley's case, 8 Rep. 40 b.

for offences within the view of the court, and amerciaments for offences committed out of it. (*e*)

With respect to the power of imposing such fines or amerciaments, it is held, that if any contempt or disturbance to the court be committed in any court of record, the judges may set upon the offender a reasonable fine. Now a leet being a court of record, and the steward a judge there; if any contempt or disturbance to the court be made before him, he may set a reasonable fine upon the offenders. Thus if the bailiff of a leet refuse in court to execute his office, or a tithing-man refuse to make a presentment in a leet, the steward shall set a reasonable fine upon him. So if one of the jurors in a leet depart without giving his verdict, or a constable refuse to take his oath of office, he shall be fined by the steward. (*f*) But for an offence done out of court, as not coming to do suit there, the steward cannot fine. (*g*) If however there be a custom in a manor, for the steward to assess a fine, for such default of suit or service, and also a a prescription in the lord to distrain for such fine so assessed; it should seem, that the distress would be good; but without such custom and prescription, the distress could not be supported. (*h*)

The same observation applies to a distress *pro certo letæ;* for although this is due to the lord on account of his purchase of a leet for the ease of his tenants, (*i*) yet this payment of it is only an advantage to the lord, without being necessary to the jurisdiction of the court; and therefore he must prescribe for a distress. (*k*)

It is essential to the validity of every fine, that it be moderate, for where it is excessive, it is deemed to be unlawful and not binding. And it is said that the reasonableness of a fine is a question to be determined by the king's justices. So that, if the fines of a manor are uncertain, yet the lord

(*e*) Griesley's case, 8 Rep. 41 a.

(*f*) Id. 38 b. The Earl of Lincoln *v.* Fisher, Cro. Eliz. 581. S.C. Moore, 470.

(*g*) Hall *v.* Turbott, Cro. Eliz. 241.

(*h*) Pierson *v.* Ridge, 1 Ventr. 105.

(*i*) 2 Inst. 71.

(*k*) Godfrey's Case, 11 Rep. 44 b. S. C. 1 Roll. Rep, 75. 33.

cannot demand excessive or unreasonable fines; if he do the copyholders may refuse to pay them: and the question, of their reasonableness shall then be determined by the king's justices. For, says Lord *Coke*, *Quam rationabilis debet esse Finis non definitur, sed omnibus circumstantiis inspectis, pendet ex justiciariorum discretione.* (*l*)

Where several persons are guilty of one offence, they should not be jointly, but severally fined: for as a fine is commonly imposed not for any general neglect of duty, but for a particular and personal misfeasance, it belongs to the very nature of the offence, that its punishment should be confined to the individual who is guilty of it. And therefore, if the jurors of a leet refuse to be sworn or to make a presentment, and the steward fine them jointly, it is void.

For non-attendance in the Leet.

The most usual cause for which an Amerciament and Distress are made under the authority of a court leet, is, for non-attendance to do suit, or be sworn there. For this is a duty attaching on all persons above the age of twelve years, resiants within the jurisdiction of the leet; except ecclesiastical persons, women, and peers of the realm; (*m*) from which no one can claim to be discharged, even by an express grant of exemption from the king. So that, where the tenant of a lord was summoned to the leet, and for non-attendance amerced, and distrained upon; and to the lord's avowry, the tenant pleaded in bar, that his lands were formerly parcel of a monastery held in Frankalmoign, and as such discharged from all secular services, and were granted by the crown to his ancestor, to hold to him and his heirs, as fully and freely as they were held in Frankalmoign, it was determined, that such grant was no discharge from the duty of attending the lord's leet: for it was said, that although the king may discharge a subject from attending at his own court or sheriff's tourn, yet he cannot grant such a discharge to the prejudice of the private leet of the lord. (*n*)

Suit at a court leet is not within the provision of the sta-

(*l*) Godfrey's case, 11 Rep. 45.

(*m*) Co. Litt. 68 b: 2 Inst. 99, 121.

(*n*) Dacre *v.* Nixon, 2 Roll. Rep. 56.

tute of Merton, and therefore cannot be done by attorney; for in this respect, it is considered as a species of suit real, which must be performed in person. (*p*) And as this suit is in respect of resiancy within a jurisdiction, it must always be performed in that leet within which the suitor is commorant. So that, if a man have two houses in different hundreds, he must do his suit in the leet of that hundred in which he most usually resides. And if he live in a house situate in two hundreds, he must attend the leet of that hundred in which he sleeps. (*q*)

Amerciaments, as I have already observed, differ from fines in several respects: and being generally imposed rather for a breach of duty, than the commission of any flagrant offence, have been considered as penalties, *pro mineribus delictis.*

Such amerciaments may be made by the jury either of a court baron or court leet: but for those made in the former, it seems to be settled, that the lord cannot distrain without a prescriptive right,(*r*) although it is said to be otherwise in the case of the king.(*s*)

Amerciaments may be found by the jury of the court leet, for all offences cognizable within it. As for not doing suit, or for committing a nuisance, or not paying the *certum letæ*, or for a contempt of the court, although it might otherwise be punished by fine. (*t*) But the leet cannot amerce for non-payment of rent to the lord, for he may at once distrain for it: nor for encroaching on the waste, or building a cottage,(*t*) For the court leet can amerce for none but public nuisances; and not for a particular trespass to the lord or any other person, for which an action lies by them to recover damages:(*u*) nor can such an amerciament be supported even by custom.(*x*)

(*p*) 2 Inst. 99.

(*q*) 2 Inst. 122.

(*r*) Godfrey's Case, 11 Rep. 45 a. Dr. and Stud. Dial. 2. ch. 9.

(*s*) Rowleston *v.* Alman. Cro. Eliz. 748.

(*t*) Com. Dig. Leet. O. I.

(*u*) Rex *v.* Dickenson, 1 Saund. 135. Blunt *v.* Whitacre, 1 Leon. 242.

(*x*) Wood *v.* Lovatt, 6 T. R. 511.

CHAP. VIII.

To authorize an amerciament, a presentment of the offence should be made by the jury of a court leet; which jury should, by the common law, consist of twelve men. (*z*) And although there be in some manors a custom for presentments to be made by a smaller number, as in the manor of St. Giles Bloomsbury, to make presentments respecting weights by six aleconners; it seems very doubtful, whether such a custom be good. (*a*) For presentments partaking of the nature of criminal proceedings, the law regards them with a jealous eye; and it has therefore been decided, that a custom to swear the jurors at one court leet, to inquire and return their presentments at the next court, is bad in law. (*b*) The jurors making the presentment should be not only tenants of the manor, but also resiants within it; for the duty to attend the leet is a personal service in respect of commorancy, and not of tenure. (*c*)

When a presentment has been duly made, it is the duty of the jury to make the amerciament. And therefore, if it be made by the lord himself, or his steward, it is bad, though made by custom: for nothing less than prescription can support a claim so much against common right. (*d*)

An amerciament, like a fine, must not be excessive: for Magna Charta (*e*) itself provides, that no freeman shall be amerced *pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti, salvo contenemento suo, &c.* (*f*)

Of affeerment.

It is therefore essential to the validity of an amerciament, that it be reasonable and moderate. And in order to determine what shall be deemed a moderate amerciament, it is in some cases necessary, not only that the amerciament should be found by the jury, instead of the court; but that its amount should afterwards be mitigated, and assessed by a

(*z*) Vide Mag. Chart. c, 14. Rast. Entr. 606.

(*a*) Duke of Bedford *v.* Alcock, 1 Wils. 248.

(*b*) Davidson *v.* Moscrop, 2 East. 55.

(*c*) Id. 60. and the authorities there cited.

(*d*) Blunt *v.* Whitacre, 1 Leon. 242.

(*e*) Ch. 14.

(*f*) See this explained by Fitzh. N. B. 75. and Barrington, 10.

kind of second jury, composed of persons called affeerors,(*g*) who are chosen in court to affeer the amerciament. These affeerors are two in number,(*h*) and, like the jurors of the court, should be persons resiants within its jurisdiction, and owing suit therein. And therefore, where an action of debt was brought for an amerciament made in a court baron, which was affeered by persons who were not freehold tenants, or free suitors of the manor; (*i*) the court held that the amerciament was bad, for they said, it ought to have been affeered *per pares de vicineto;* and that no persons could be such *pares,* but those who were freehold tenants of the same manor.(*k*)

This affeerment was formerly thought necessary in all cases of amerciaments. So that, where, in an action of tresspass, the defendant justified under a presentment in the leet, whereon the plaintiff was amerced, and the amerciament affeered to ten shillings, Lord *Hobart* held that the plea was bad; because it stated generally that the plaintiff was amerced, and that it was afterwards affeerd to ten shillings, without shewing in what sum the amerciament was first made.(*l*) And the same point was ruled, in another case, where in an action of debt for an amerciament in a court leet, the declaration stated, that the defendant was presented and amerced, *which said amerciament was affeered by all the jurors to forty shillings,* without shewing a separate affeerment; for this cause, the declaration was held bad on general demurrer.(*m*)

This doctrine has however been completely over-ruled in several later cases; and it now seems to be perfectly clear, that if the jury do in the first instance amerce in a sum certain, no affeerment is afterwards necessary.(*n*)

(*g*) F. N. B. 75.

(*h*) Matthews *v.* Cary, 1 Show. 62.

(*i*) See note (2) in Chetwood *v.* Crewe, Willes, Rep. 619.

(*k*) Baldwin *v.* Tudge, 2 Wils. 20.

(*l*) Wilton *v.* Hardingham, Hob. Rep. 129.

(*m*) Evelin *v.* Davies, 3 Lev. 206. S. P. Conyers *v.* Franke, ibid. 19.

(*n*) Brook *v.* Hustler, Salk. 56. Matthews *v.* Cary, 1 Shower, 62. Duke of Bedford *v.* Alcock, 1 Wils. 251. Stephens *v.* Houghton,

CHAP. VIII.

In such case, the regular course of proceeding therefore appears to be, for the court to declare the defendant to be in *misericordia*, and thereupon for the jury to find, that he be therefore amerced in the sum of forty shillings, or other certain sum.(*a*)

Where the offence committed by the defendant is such as to be properly cognizable by the court alone, it is still more clear that no affeerment is necessary; for then the judgment of the court is rather in the nature of a fine, than an amerciament. (*a*)

Amerciament for joint offences.

Where one offence is committed jointly by several persons, the amerciament may be joint; but then it must be severally affeered upon each, and several distresses must be made for such affeerments. But where the commission of the offence is several, in each of the defendants; the amerciament must necessarily be several in the first instance.(*p*)

In some cases however, as for a nuisance committed by the inhabitants of a town or hundred, the amerciament must of course be general. (*p*)

Where a distress for an amerciament may be made.

A distress for an amerciament may be made in the highway, as the statute of Marlebridge does not extend to this kind of distress. (*q*) For an amerciament in the sheriff's tourn, the distress may be taken in any part of the county; and if made in a hundred, may be taken in any part of the hundred, unless on land in the possession of the king. So that the lord may distrain the goods of the offender, if found on the lord's own demesne lands, within the jurisdiction of the court; (*q*) or indeed, on lands holden of any other person within such limits. And therefore, if a man belonging to one district of a leet be amerced in the court leet, his goods may be taken in any part of its jurisdiction, although in a different district. (*r*)

1 Barnard. 214. Vide Gryffyth *v.* Biddle Cro. Car. 275. S. C. Sir W. Jones, 301. Stephens *v.* Howard, Gibbon, 108.

(*o*) The Cases last cited, and Griesley's Case, 8 Rep. 39, 40. et vide 3 Salk. 33.

(*p*) Godfrey's case, 11 Rep. 42, 43.

(*q*) 2 Inst. 131. 1 Roll. Abr. 670.

(*r*) 6 Edw. 3. 10. cited in Godfrey's case, 11 Rep. 44 b.

Whose goods may be distrained.

Amerciaments being for a merely personal offence, the goods of the person amerced only can be taken; and not those of a stranger, although levant and couchant on the offender's land.(*x*)

Where several amerciaments are due from one person for distinct offences, it seems that they should not be distrained for together in one entire sum, but should be levied separately. (*y*) This rule however was held not to apply to the case of a justification in trespass for making one distress for several rates; for where upon an appeal against an assessment it was confirmed, and one warrant of distress made for that and other taxes; and trespass was brought by the person whose goods were distrained; the court held, that however improper the tax objected to might be, it was binding on the parties, and the warrant, though it included all the taxes, was sufficient to support the distress. (*z*)

Distress for penalties and bye-laws.

Another subject of distress, analogous to fines and amerciaments, is that of penalties. Some of which are imposed by bye laws, and others by acts of parliament. The most common remedy for the recovery of penalties imposed by the authority of bye laws, is an action of debt: in some cases however they are also recoverable by distress: but this is only where the bye law itself enacts that the penalty shall be levied by distress, or there is a prescription for levying it in that manner.(*a*) No bye law can however go farther than to warrant the distress; for if it enact, that the offender's goods shall not only be distrained, but also sold; it is utterly void both for the sale and the distress.(*b*)

As the infraction of a bye law is a merely personal offence, the distress must always be understood to extend only to the goods of the offender.(*c*) And, therefore, if a township be liable to a penalty, it cannot be levied on the goods of an

(*x*) 2 Hawk. P. C. 59. and see Pill *v.* Towers, Cro. Eliz. 791.

(*y*) Hunt's Gilbert, p. 85.

(*z*) Patchett *v.* Bancroft, 7 T. R. 367.

(*a*) 1 Roll. Abr. 366, 367. Clarke *v.* Tucket, 3 Lev. 281. S.C. 2 Vent. 183. Clark's case, 5 Co. 64. Sed vide Adley *v.* Reeves, 2 M. & S. 60.

(*b*) Clarke *v.* Tucket, 2 Vent. 183.

(*c*) 1 Roll. Abr. 366.

CHAP VIII. individual, unless he be entitled to have contribution from other persons subject to it. (*d*)

Where a bye-law is binding, it is good without particular notice to those who are subject to it. And, therefore, a bye-law in a manor binds the tenants without notice, because they are supposed to be within the manor. (*e*)

Bye-laws, like customs, depend on their legal requisites for validity. And, therefore, no distress under them can be supported, unless they are lawful, reasonable, and not injurious to the public.

Of a distress to compel appearance.

There is another proceeding, which bears a considerable analogy to a distress for fines and amerciaments; I mean that of distringas, to compel appearance in various courts, to actions real or personal. But as the consideration of the nature and rules of that process does not exactly fall within the design of the present work, I shall content myself with offering to the reader, what has been written on this subject by the Lord Chief Baron *Gilbert*.

"Here it may not be improper (says that learned writer) "barely to mention another sort of distress, which is the "last and great process in courts of judicature, to bring the "defendant into court, and oblige him to appear in civil "cases, in actions as well real as personal."

"This process is the attachment, which lies as well in "inferior courts, not of record, as in superior courts; and "it is given, when the defendant has been summoned to "appear, and makes default; and it was not a process "against the body of the defendant, but against his goods "and chattels; for the officer attaches the defendant by his "horse, his ox, or his cow. And where this process issues "out of a court of record, there is no doubt, but if the de-"fendant makes default, the goods he was attached by, are "forfeited; because, in such case, there is a judgment of the "King's Court of Record, condemning the goods which "alters the property."

"And it seems, that in the county court, and court "baron, which are not courts of record, if the defendant

(*d*) Wells *v.* Cotterel, 3 Lev. 49. Ventr. 167.

(*e*) Isaac *v.* Ledgingham, 1

" does not appear upon the attachment or distress, the " goods by which he was attached or distrained, are likewise forfeited on his default. The reason why in this " single instance, the property is altered without the King's " writ, or the judgment of a court of record, seems to be, " for the more speedy administration of justice, which is of " public advantage, and the party by his appearance might " have prevented the forfeiture."

" And here, we may likewise observe, that where the plaintiff recovers in the county court or court baron, the execution is only by distress, that is, there issues a precept to the " officer of the court, to take the goods of the defendant, and " keep them in pound, until the defendant satisfy the plaintiff " his debt. The reason is because those are not courts of record, being held only in the lord's or sheriff's name, and " therefore all the process runs in their names, and not in the " king's ; and without the king's writ, no property can be altered. So that the execution in these inferior courts only " seizes and detains the defendant's goods, until he make the " plaintiff satisfaction for his debt. We find therefore in the " register, the king's writ *de executione judicii* of these inferior judgments, and by virtue of that, they may levy the " plaintiff's debt, as if he had recovered in a court of record. " In the lord's court, if the defendant does not appear to do " justice to the complainant on the summons, on the next process he ought to give pledges or caution for his appearance ; " and therefore, upon the attachment, they may return him " attached, *per plegios*, and then if he don't appear, his " pledges shall be amerced ; for which amerciament, the lord " may have his action of debt ; if the defendant cannot find " pledges, the attachment is *per vadios* ; and since the lord " would have had the amerciament, if the defendant had been " attached by pledges, and had not appeared : therefore, if he " be attached *per vadios*, and do not appear, the *vadii* are forfeited : for the *vadii* came instead of the *plegii*, and therefore, are hypothecated for his appearance in judgment of law. " And by consequence, if he doth not appear to perform the " condition of such pignoration, the *vadii* are forfeited, and " therefore the defendant, where he is attached *per vadios*,

"may before the day of his appearance, replevy the *vadios*, "and put in pledges, who are answerable for his appear- "ance; and if he makes default, are amerced."

"But if there be a *levari facias* for a debt recovered in "the lord's court, there the goods are not forfeited on the "return; because after judgment, he hath no day to ap- "pear; and therefore there can be no forfeiture arising to "the lord, nor the party; inasmuch as he was not bound by "his fealty to do any such act to the party recovering; "and consequently here, the lord only seizes the chattels of "his tenant, to make him pay his debts. But the plaintiff "must apply to the king's court, to have the property altered "by a writ, *de executione judicii*, and so hath a complete "remedy for his demand."

"But if the *vadii* were not to be forfeited on mesne pro- "cess, the tenant will let such goods lie till at his leisure he "could come in to contest the debt, which would tend to the "delay of justice."

"And here, note by the way, that the lord's distress for "rent, is in nature of a prerogative process, to take the "goods and chattels of his debtor, in the first instance, "without any summons; but at the next court-day such "distress is not forfeited to the lord, if not replevied, be- "cause then he would judge of forfeitures in his own "cause."

"But if the tenant was aggrieved, he must apply to the "King, who is the paramount, and the complaint is, that he "was distrained *contra vadios et plegios*, that is, when he "was ready to give good security to contest the lord's debt; "and, therefore, the jndgment in replevin is of return irre- "plevisable; that is, that the lord has a just cause to detain "—that such prerogative of the lord's should take place, "till the debt be satisfied." (*f*)

(*f*) Gilb. on Distresses, &c. by Hunt, p. 19—22.

CHAPTER IX.

Of a Distress for Tolls and Port Duties.

Nature of toll.

TOLL is of various kinds; the principal of which is a duty usually paid by the buyer of goods, upon the sale thereof in a fair or market. It is not however necessarily incident to every market or fair, for if the king grant to a subject by patent, a market or fair, without a grant of toll, the patentee will not be entitled to toll therein. (*a*) So that it can be claimed only by grant, or prescription. (*b*)

It is not however sufficient, that there be a grant of toll: for if such toll be not reasonable and moderate, the grant will be void. (*a*) And that it may appear to have this requisite to its validity, as well as to render it certain, it seems that the amount of the toll should be specified in the grant; or it will otherwise be void. Thus, where there was a grant to take such toll at two bridges within a manor, *as is used to be taken ibi et alibi infra regnum Angliæ*, was held uncertain and void. (*c*)

Of common right, no toll is due for things brought to a market or fair, unless they be sold; and then the toll is to be taken of the buyer: but in ancient fairs or markets, toll may be due for standing, although nothing be sold. This however can be supported only by custom; and the fair or market must have been granted before the period of legal me-

(*a*) 2 Inst. 220. Holloway *v.* Smith, Stra. 1171.

(*b*) Warrington *v.* Moseley, 4 Mod. 319.

(*c*) Lightfoot *v.* Lenet, Cro. Jac. 421. See note (*a*) Holcroft *v.* Heel, 1 Bos. & Pull. 402.

CHAP. IX.

mory, that is, before the reign of King Richard the First. (*l*) The toll must also be confined to a common fair or market, which implies a public benefit, and therefore cannot be claimed for all goods sold within the limits of a manor. (*m*) And even for things sold in a market, toll is not due of common right, except upon the sale of live cattle; (*n*) although by special custom or prescription, it may be due upon all things sold therein. (*o*)

Where the goods sold are not brought into the market, but only sold there by sample, no toll is due in respect of them; (*p*) but it seems that an action on the case may be maintained against the seller, for the injury so done to the market; (*q*) but not against the buyer for he has no election and may be driven to the necessity of buying his goods in this way, or wanting them altogether. (*r*)

Toll-Traverse.

Toll-traverse is a toll due for a passage over a man's private soil. It is not however due of common right, but must be prescribed for; although no consideration is required to support such prescription; because it is but a reasonable compensation for the use of another's land. (*s*) And if there be such a prescription for toll due to the lord, for passing over any part of his manor, it will be good, although the land itself be not in his possession; for it may be presumed to have been anciently part of the demesnes of the manor. (*t*) Where such toll is due, it is said, that it should be claimed as an easement, and not as appendant to the manor. (*u*)

Toll-Thorough.

Toll-thorough is a toll claimed for a way through a common street or public highway. And as such a claim is

(*l*) 2 Instit. 221. Leigh *v.* Pym, 2 Lutw. 1336.

(*m*) Warrington *v.* Mosely, 4 Mod. 319.

(*n*) Heddy *v.* Walhouse, Moore, 474.

(*o*) Lord Cobham *v.* Brown, 1 Leon. 218.

(*p*) Mosely *v.* Pierson, 4 T. R. 108. Hill *v.* Smith, 10 East. 485. et 4 Taunt. 520.

(*q*) The Bailiff of Tewkesbury, 2 Taunt. 120.

(*r*) The Bailiff of Tewkesbury *v.* Diston, 6 East, 438.

(*s*) Smith *v.* Shepherd, Cro. Eliz. 710. 2 Roll. Abr. 522.

(*t*) Crispe *v.* Belwood, 3 Lev. 424. Prideaux *v.* Warne, 2 do. 96.

(*u*) Anonymous, 54. Keilw. 152.

against common right, it is requisite that there should be not only a grant or prescription to support it, but also that a consideration for such grant or prescription should be shewn; as that of repairing the street or public way.(*w*) And such consideration must belong to the place itself in respect of which the toll is claimed, and therefore a prescription for toll of all goods carried through a town, in consideration of repairing only some of its streets, connot be supported; (*x*) the goods must be carried over the very place in respect of the repairs whereof the toll is demanded. But where toll was claimed for passing over a highway which had been immemorially public; yet upon its being shewn, that anciently before the time of legal memory, the soil and the toll were united in the same proprietor, after which time the way had become public, the court held, that the dedication of the way to the public, should be presumed to have been made in consideration of the toll; and therefore that no other consideration was requisite to support the prescription. (*y*) But unless there be some particular presumption to support the claim, a mere prescription is insufficient. And therefore a claim of toll for passing along a public navigable river, running through the plaintiff's manor, is bad; for it is a prescription against the common right of all the subjects of the realm. (*z*)

Distress for Port Duties.

Another species of toll is that of port-toll, or port-duty; which is a claim of toll for vessels coming to, or going from a port or wharf; or for goods landed there, or exported therefrom. In some of these cases, a specific consideration for the toll must be shewn; in others a sufficient consideration is implied by the mere existence of the port, in respect of which the toll is claimed. Thus, where the lord of a manor, in consideration of keeping and repairing a wharf within his manor, prescribed for toll on all goods landed within the manor, though not at the wharf, such prescrip-

(*w*) 2 Roll. Ab. 522. Smith *v.* Shepherd, Moore, 574. Mayor, &c. of Nottingham *v.* Lambert, Willes, Rep. 115.

(*x*) Truman *v.* Walgan, 2 Wils. 296. Hill *v.* Smith, 4 Taunt. 520. 531.

(*y*) Lord Pelham *v*, Pickersgill, 1 T. R. 660.

(*z*) Mayor of Nottingham *v.* Lambert, Willes, Rep. 111.

tion was held to be good as an easement of the manor, all the lands of which must be presumed to have been originally in the hands of the lord; and therefore such toll was to be considered as a toll-traverse, and not a toll-thorough. (*a*) But where the lord, in consideration of repairing a quay, claimed toll on all goods brought into the river, although landed at a distance from the quay, and without the manor; such prescription was clearly held to be bad. (*b*) So where the city of *Norwich*, in consideration of repairing a quay, claimed toll for all vessels passing by it, it was determined to be void: for this is a mere toll-thorough, claimed for using a public river, without any consideration extending to the river itself. (*c*)

But toll or port duty, strictly so called, claimed in respect of a public port, does not require any other consideration to support it than the existence of the port itself, which alone implies a public benefit. (*d*) So that, in a modern case in which the corporation of *Yarmouth* claimed measurage, or a toll of two pence for every last of corn or grain measured and exported from the port of *Great Yarmouth*, the court of King's Bench held that it was not necessary to allege or shew any repair done to the port; for that the mere existence of the port was sufficient to support the plaintiff's claim. (*e*) So, where the mayor and commonality of *London* claimed weighage for all goods brought into the port of *London*, it was held to be good; for the bringing them into port, which is a place of safety, implies a consideration in itself. (*f*) Indeed, as the owners of a public port are of common right bound to keep it in repair, for the neglect of which they are liable to indictment, such implied obligation is a sufficient consideration for the toll.

(*a*) Crispe *v.* Belwood, 3 Lev. 424. Colton *v.* Smith, Cowp. Rep. 47.

(*b*) Prideaux *v.* Warne, 2 Lev. 96.

(*c*) Anonymous, 1 Vent. 71. Heshord *v.* Wills, 1 Sid. 454.

(*d*) Wilkes *v.* Kirby, 2 Lutw. 1523.

(*e*) Mayor of Yarmouth *v.* Eaton, 3 Burr. 1402.

(*f*) Mayor of London *v.* Hunt, 3 Lev. 37.

It may therefore be taken as a general rule, that tolls and duties are of common right incident to every public port. And they are due in different kinds, according to the nature of the property in the port, as a franchise only, or in the very soil itself. Some kinds of toll, as anchorage and ballastage, being incident to almost every port; other kinds, as keelage, primage, &c. being generally due by special usage and prescription.(*g*)

Although tolls are thus in many cases due by prescription, and in others of common right, there are some persons who may claim to be exempt from them. Thus the king, by his prerogative, is free from all tolls. (*h*) And by the custom of the realm, both the lord and tenants in ancient demesne may claim to be quit of all kinds of toll in markets or fairs, for goods bought or sold by them for the sustenance of their families, or tillage of their lands; (*i*) but not for goods bought in the way of merchandize. (*k*) They are also free from pontage, murage, and passage; and this privilege extends to them, whether the lands be in the seisin of the King or a subject. By the like custom, ecclesiastical persons are said to be free from toll on all goods bought for their own maintenance. (*l*) So the inhabitants of a city or borough may in some cases prescribe to be quit of toll: (*m*) as to pass free of toll over an ancient ferry.(*n*) And in a modern case, the Court of Common Pleas recognized the right claimed by the freemen of *London*, to be exempt from the payment of all tolls and port duties throughout *England*, except the prisage of wines. (*o*) So the King may grant by charter to the commonalty of a city or burgesses of a borough, to be quit of tolls throughout *England*; (*p*)

(*g*) Hale de partibus Maris apud. Harg. Law Tracts.

(*h*) Rex *v.* Corporation of Maidenhead, Palm. 85.

(*i*) F. N. B. 228.

(*k*) Ward *v.* Knight, 1 Leon. 231. S. C. Cro. Eliz. 227.

(*l*) F. N. B. 227.

(*m*) Id. 226. Osbuston *v.* James, 2 Lutw. 1380.

(*n*) Payn *v.* Partridge, 1 Salk. 12.

(*o*) Mayor, &c. of London *v.* Mayor, &c. of Lynn Regis, 1 H. Bl. 206. 4 T. R. 130. 6 T. R. 778.

(*p*) Leight *v.* Pym, 2 Lutw. 1332.

CHAP. IX. but it seems that such a grant does not exempt from toll claimed by custom, or by virtue of a preceding grant of toll made by the crown.(*q*)

Distress is said to be incident to every toll; (*r*) but this I apprehend must be understood only of such toll as is not against common right; such as market toll, toll traverse, and port duty: but that for toll thorough, the plaintiff must not only prescribe for the toll, but also for the distress.

A distress for toll is exempt from some restrictions which belong to other distresses. It is not within the statute of Marlebridge, and therefore may be taken on the highway: (*s*) indeed, if this were not allowed, the remedy of distress would frequently be defeated; for in some cases the toll itself, as toll thorough, arises from the very circumstance of being in the highway.

A similar remark may be applied to the exemption from distress, which belongs to goods in fair or market, or such as are the implements of trade, which exemption therefore does not extend to a distress for toll. (*t*) But it should seem, that the toll itself must arise within such fair or market; and therefore that goods found therein cannot be distrained for toll arising elsewhere.

The distress may be made either on the thing itself for which the toll is due, as a horse, for his toll thorough; (*u*) or on a part of such thing, as on a cable or anchor, for the toll of a ship; (*w*) or on a sheep, for the toll of the whole flock. (*x*) And if the distress cannot be made on the subject of the toll, it may be made on any other goods of the person from whom it is due, that may be found where the toll is due.(*y*) Nor is it confined to the goods of such per-

(*q*) Hale, note (*c*) to F. N. B. 226.

(*r*) Hickman's case, Noy. 37.

(*s*) 2 Inst. 131. Smith *v.* Shepherd, Cro. Eliz. 710.

(*t*) Osbuston *v.* James, 2 Lutw. 1380. Vinkenstone *v.* Ebden, Carth. 358. S. C. 1 Salk. 248.

(*u*) Harrison *v.* Brough, 6 T. R. 706.

(*w*) Prideaux *v.* Warne, 2 Lev. 96.

(*x*) Smith *v.* Shepherd, Cro. Eliz. 710. Osbuston *v.* James, 2 Lutw. 1380.

(*y*) Vinkenstone *v.* Emden, Lord Raym. 386. S. C. 1 Salk. 248.

sons as may be strictly the owners of the things for which the toll is payable; for where port toll was due on goods exported, the owner of the ship in which they were exported, although he had no property in the goods, was considered with relation to the proprietors of the toll, to be the exporter of the goods, and as such, that the sails of his ship might be distrained for the duty. (z)

(z) Vinkenstone v. Emden, Lord Raym. 386. S. C. 1 Salk. 248.

CHAPTER X.

Of a Distress of Things Damage-Feasant.

If cattle, unless they be the cattle of the King,(a) or other things, be on a man's land, incumbering it, or otherwise doing damage there, they may be distrained by the person injured thereby: which is called a distress of things damage-feasant. And "this," says Lord *Gilbert*, "according to *Fleta*, is grounded on a particular custom of the "realm. *Dicere poterit captor, quod justè cepit averia, "quia invenit illa in terrâ suâ, et secundum consuetudines "regni impercavit illa, donec damnum suum fuerit eman-"datum.*(b) But from whence this notion was borrowed, "or whenever it was introduced, it is highly reasonable, "that the owner of the land should defend himself from in-"jury, by driving out the beasts, and likewise by detaining "the thing that did the injury, in a public pound, till com-"pensation be made for the trespass; for otherwise he "might never find the person whose beasts committed the "trespass."(c)

(a) Mayn. Ed. 1. 26.
(b) Fleta, p. 101. § 25.
(c) Gilb. Distr. by Hunt, p. 26.

As a distress of things damage-feasant is made for the immediate injury sustained by their so doing damage, it is reasonable that this remedy should not be confined to the mere owner of the soil, on which they may be found: and it therefore extends to those who may be injured by their being thereon; as commoners, or other persons entitled to the use or produce of the land.(*d*) For as the soil itself usually belongs to the lord, if the remedy of distress were confined to him, the commoner might often be left without sufficient redress. (*e*) He cannot however resort to a distress, where the owner of the cattle has any colour of right to put them on the land: for to distrain them in such a case, would be for the commoner to judge for himself in a question that depends upon a more competent inquiry; but where cattle are put upon the common, without any colour or pretence of right, the commoner may distrain them; and therefore he may always distrain the cattle of a stranger thereon.(*f*)

But it seldom happens, that a commoner can distrain the cattle of the lord, unless by special custom.(*g*) In some cases, however, he may, as where the land was by custom to lie fresh until Lady-day in the year succeeding the cutting of the corn, during that time the lord being absolutely excluded from the land, it was held that the commoner might distrain his beasts found thereon. (*h*) So, where by custom the lord could not put on the land more than three horses after Lammas-day, it was determined that the commoner might distrain any additional horses, for they were as evidently trespassers on the land, as if they had belonged to a stranger.(*i*) And it seems, that if cattle be agisted by the lord, and improperly put on the common, the com-

(*d*) 1 Roll. Abr. 405.

(*e*) Mary's case, 9 Rep. 112 b.

(*f*) Hall *v.* Harding, 4 Bur. 2432. S. C. 1 Blk. 674.

(*g*) Kinrick *v.* Pargiter. Yelv. 129.

(*h*) 1 Roll. Ab. 405—6. Burt *v.* Moore, 5 T. R. 335.

(*i*) Kinrick *v.* Pargiter, Cro. Jac. 208. S. C. Yelv. 129. This custom or prescription against the lord is indeed denied to be good in 2 Roll. Ab. 267; but as it should seem for a very insufficient reason. V. Burr. 2429. ut supra, and Saund. cited infra.

moners may distrain them as the cattle of a stranger.(*k*) Indeed, there seems to be good reason, why in many cases, commoners should be permitted to distrain the cattle of the lord, since it is held that even the copyholders of a manor may be entitled to the sole and several pasture of the lord's soil, to the exclusion of the lord himself.(*l*) But where the lord has any pretence of right for putting on his own cattle, although he may have been guilty of a surcharge, provided his number be not *absolutely stinted*, it is perfectly clear that the commoner cannot distrain those surcharging. (*m*) And indeed the same rule of law applies to the case of a surcharge made by another commoner. So that if the owner of the cattle have a right of common of pasture for two sheep for every acre of land, here the number of the cattle not being absolutely certain in itself but requiring a medium to determine it, namely an admeasurement of the commoner's land; another commoner cannot distrain the cattle surcharging.(*n*) So if the right of common be for cattle levant and couchant on the owner's land, another commoner cannot distrain for a surcharge, but must try by a jury, the number accommodated to the land.(*n*) If, however, a commoner's right be absolutely stinted in number, as to put on ten beasts only, and he puts on a greater number, it should rather seem, that the overplus may be distrained by another commoner, and certainly may be distrained by the lord.(*o*) If the stint of common be for one beast, and two be separately put on, it seems that only the beast last put on can be distrained for the surcharge; but if they are put on together, then the lord may distrain which of them he chuses.(*p*)

Where a commoner agrees not to exercise his right of common for a certain time, he thereby during such time, renders himself a stranger to the land, and his cattle may be distrained accordingly. Thus, where *A.* was possessed of part of a common field, with right of common over the

(*k*) 30 Edw. 3. 27.

(*l*) Hoskins *v.* Robins, 2 Saund. 324.

(*m*) Hodesdon *v.* Gresil, Yelv. 104. Danv. Abr. Vol. 1. pl. 6. in margine.

(*n*) Hall *v.* Harding, Burr. 2431. S. C. Blk. Rep. 674.

(*o*) 1 Roll. Abr. 665. Dixon *v.* James, 2 Lutw. 1241. Burr. 2431. ut supra.

(*p*) Ellis *v.* Rowles, Willes, 638.

whole field, and *B.* having a similar right, they entered into an agreement not to exercise their rights for a certain number of years, it was held that *A.* might distrain, as damage-feasant, the cattle of *B.* coming on his land during that time.(*q*) But such a distress can be made only for the cattle doing damage on the distrainor's part of the land; for if there be a shack common, (that is, an open common field, consisting of different parcels, with intercommonings) of which every one knows his own parcel, and cattle be put on it at an improper season of the year, they can be distrained only by him on whose parcel of the common field they are damage-feasant. (*r*) And if two persons have the concurrent possession of a close, for the exercise of distinct, but not inconsistent rights, they cannot distrain the cattle of each other damage-feasant.(*s*)

A guardian in socage may distrain cattle damage-feasant,(*t*) and so may a husband and wife jointly.(*u*)

If a distress damage-feasant be made in respect of a right of common of pasture, to which two tenants in common are entitled, the distress should be joint; for it is made in respect of their joint possession, and not of their several estates.(*v*) And where it is made in respect of their several estates, as for damage-feasant on land, to which two tenants in common are entitled, although either of them may distrain alone, yet he must avow in his own name, and make cognizance as bailiff of his co-tenant.(*w*) And as a distress for damage-feasant is made on account of an immediate injury or prejudice to the enjoyment of the land and its produce, the right of distress will pass to a grantee of the vesture of the soil. Thus, where the King granted to one the herbage of a forest, it was held that the grantee might distrain as damage-feasant any cattle coming on the land.(*x*)

(*q*) Whiteman *v.* King, 2 H. Bl. 4.

(*r*) 1 Roll. Abr. 665.

(*s*) Churchill *v.* Evans, 1 Taunt. 529.

(*t*) Wade *v.* Baker, 1 Ld. Raym. 130.

(*u*) Thresher *v.* Chapman, 1 Barnard, 36.

(*v*) Culley *v.* Shearman, 2 H. Bl. 386.

(*w*) Willis *v.* Fletcher, Cro. Eliz. 530. Anon. Sir Wm. Jones, 253.

(*x*) Dyer, 285. pl. 40.

So, also, where *A.* demised to *B.* the milk of twenty-two cows, to be provided by *A.* and fed at his expence on certain closes belonging to him, and he covenanted that *B.* might turn out a horse, and that no other cattle should be fed there, it was held that *B.* might distrain, as damage-feasant, any other cattle of *A.* found thereon. (*y*) In like manner, if a man put cattle into my pasture for a week, and afterwards I give him notice that I will keep them no longer, and he will not fetch them away, I may then distrain them as damage-feasant. (*z*)

Cattle may be distrained as damage-feasant, not only for the injury which they may do to the pasture or herbage of the land, but for damage of any other kind; as by the lord of the soil, although he may not have any interest in the herbage; for there may be other damage besides eating the grass, as by destroying plants or trees, in which the interest of the lord still continues. (*a*)

If tithes are suffered to remain on the land, after a reasonable time has elapsed for carrying them away, they may be distrained as damage-feasant; but the owner must not turn his cattle on the land to consume them. (*b*)

Before the Statute of Uses, it was held, that a *cestuy que use* could not distrain cattle damage-feasant on his land; but now, wherever the use is extended by the statute, it should seem that the *cestuy que use* is entitled to distrain, because he has an estate in the land. (*c*)

As this kind of distress is made for the injury sustained by reason of the very thing distrained, it necessarily follows, that no kind of thing which is capable of being damage-feasant can be exempted from distress; (*d*) unless it be in immediate use, as a horse on which a man is riding, or a net in his hand: (*e*) for to distrain these might probably lead

(*y*) Burt *v.* More, 5 T. R. 329.

(*z*) Noy's Maxims, 33.

(*a*) Hoskins *v.* Robins, 2 Saund. 328.

(*b*) Shapcot *v.* Mugford, 1 Lord Raym. 187. Williams *v.* Ladnar, 8 T. R. 72. Baker *v.* Leather, 1 Wight. 113.

(*c*) 15 Hen. 7. cited Dyer 9. pl. 26.

(*d*) Com. Dig. Distress, B. 4.

(*e*) See the cases cited post. Chap. XI.

to a breach of the peace. But the distress must be confined to the very thing which is damage-feasant; for one thing cannot be distrained for the damage done by another. Thus, as we have seen in the case of surcharging common,(*f*) it is only the cattle creating the surcharge, that can be distrained. So if ten head of cattle be damage-feasant, and all but one escape before distress, the owner of the soil cannot distrain that one for the damage done by all; but only for the damage done by itself; and he must bring trespass for the damage done by the remainder. (*g*) The same cattle may however be twice distrained, if they a second time do damage on the land, although their owner may have replevied them after the first distress, for this is a new injury. (*h*)

If a tenant holds over after the expiration of his term, he cannot distrain the cattle of his landlord put on to take possession. (*i*)

If cattle be really trespassers on the land, it matters not to whom they belong, for they may be distrained damage-feasant although they may have come on the land without their owner's knowledge or consent, or by the default of another, (*k*) provided that it be not by the default of the owner of the soil, or his tenant; as by not properly repairing the fences of the land; for in that case, the distrainor cannot take advantage of his own wrong. But if the owner of the cattle suffer them to remain on the land after notice given to him to remove them, they may be distrained for any damage done after such notice. (*l*)

As a distress of things damage-feasant must be made whilst they are doing damage, the law allows this distress to be made in the night, or in short, whenever they are so found on the land; for otherwise, the cattle might escape.(*m*) But in all other respects, both as to time and place, this

(*f*) Ante, p. 137.

(*g*) Vaspor *v.* Edwards, 12 Mod. 660.

(*h*) F. N. B. 71.

(*i*) Taunton *v.* Costar, 7 T. R. 431.

(*k*) 1 Roll. Abr. 665.

(*l*) Edwards *v.* Halinder, 2 Leon. 93. Kimp *v.* Crewes, 2 Lutw. 1579. Com. Dig. Pleader, 3 M. 29. cited in note (4) to Poole *v.* Longueville, Wms. Saund. 2. 285.

(*m*) Co. Litt. 142 a.

kind of distress is of all the strictest; for the thing distrained must be taken in the very act; so that if the cattle are once off the land, they cannot be taken even on fresh pursuit,(*n*) although they may have been purposely driven off the land, in order to prevent the distress, and within the very view of the person coming to distrain them. (*o*) If, however, the distrainor once *enter the locus in quo* to distrain the cattle, it should seem that they cannot afterwards be driven off the land,(*p*) so as to prevent the distress. If the cattle being impounded, escape by his own default, the distrainor cannot make another distress; (*q*) but otherwise he may, or may bring trespass.(*r*)

Cattle can be distrained only for the damage done *at one time* on the land; so that, if beasts trespass on the land on one day, and then go off, before they can be distrained, and trespass on it the next day, and then are taken, they cannot be detained for the damage done on both days, but only for that done on the latter.(*n*) And, as I have before observed, if there are several beasts, each must be detained only for the damage done by itself, and not for any part of that done by the rest.(*n*)

If cattle be merely on the land, but not doing damage there, (which may very well happen if there be not at the time any thing growing thereon) it seems that they cannot be distrained as a damage-feasant. (*n*)

Things can be considered as damage-feasant only on a private soil: so that corn pitched in a market, or hides brought there for sale, cannot be distrained as damage-feasant; for things cannot be said to be damage-feasant in a public market, where persons have a right to bring their goods for sale. (*s*) But where any thing is improperly placed on another's soil, it is not necessary that it should

(*n*) Vaspor *v.* Edwards, 12 Mod. 660.

(*o*) Co. Litt. 161 a.

(*p*) Clement *v.* Milner, 3 Esp. Rep. 95.

(*q*) Cas. temp. Holt, 257.

(*r*) Bac. Abr. Tresp. F. 1.

(*s*) Mayor of Lawnson's case, Cro. Eliz. 75. Frasel *v.* Morris, Noy, Rep. 19. Austin *v.* Whitred, Willes, Rep. 623.

actually do an injury to the soil, or its produce; it is enough that it unlawfully incumbers it; and therefore if turves be laid on a common, it seems that they may be distrained by a commoner as damage-feasant, although he could not justify destroying them. (*t*) For a distrainor can have no right to use destroy or injure the things taken as damage-feasant, but only to detain them, as a pledge for the satisfaction of the injury sustained. And, therefore, if a person endeavouring to distrain beasts damage-feasant, improperly drive and chase them, so as to injure the cattle, their owner will be entitled to recover a satisfaction in damages. (*u*)

(*t*) Bromhall *v.* Norton, Sir Thomas Jones, 193.

(*u*) Anonymous, 3 Leon. Rep. 15.

CHAPTER XI.

Of the Things which may be taken as a Distress.

It may be laid down as a general rule, that even at the common law, all personal chattels are liable to be taken as a distress, unless they fall within some of those exemptions which will be hereafter specified. And as with relation to such exemptions, the points of difference between the subjects of a distress for rent, or other causes, are not very numerous, it will be convenient to consider them together, pointing out their distinctions as we proceed.

It has been already observed, that a distress was regarded at the common law only as a pledge. And this principle has given birth to various exemptions from the general liability to distress, both with respect to the nature of the thing distrained, and the property, or possession of the person from whom it is taken.

No distress of things in which there can be no valuable property.

First, As every thing which is distrained is presumed to be the property of the wrong-doer, the distress must be of a thing in which there may be a valuable property: and therefore dogs, cats, bucks, does, or other animals that are *feræ naturæ*, cannot be distrained. (*a*) Yet if deer are kept in a private inclosure for sale, or profit, they may be distrained for rent. (*b*) And other animals, as greyhounds and ferrets, and indeed all personal chattels, may be taken damage-feasant. (*c*)

Nor of things in present use.

Secondly, Whatever is in a man's present use or occupation, is during that time privileged from distress; as a horse on which he is riding, or an axe with which he is cutting wood. (*d*) This rule extends even to the case of a distress damage-feasant; for although it is said to have been formerly held, that horses might be severed from the plough, (*e*) or a horse taken damage-feasant, and impounded, although a rider were upon him; such distress is now determined to be unlawful, as it would be liable to lead to a breach of the peace. (*f*) So nets or ferrets cannot be taken damage-feasant in a warren, if they are in the hands of a person using them. (*g*) And although it was formerly considered, that a cart and horses when carrying corn, or hay, might be distrained for rent-service, (*h*) it seems now to be held, that such a distress would be illegal, as being made on things in immediate use. On the same ground, it has been determined, that a loom cannot be distrained when in the hands of the weaver; (*i*) nor wearing apparel, if in

(*a*) Co. Litt. 47 a. Blacks. Comm. V. 3. 7.

(*b*) Davies *v.* Powell, Willes, 46. It may be doubted from the judgment in this case, whether *dogs* cannot at the present day be taken, as a distress for rent.

(*c*) Athol *v.* Corbet, Cro. Jac. 463. Vin. Abr. Distress, A. Com. Dig. Distress, B. 4.

(*d*) Co. Lit. 47 a.

(*e*) Tunbridge's Case, Cro. Eliz. 7.

(*f*) Hargrave, note (12) on Co. Litt. 47 a. Storey *v.* Robinson, 6 T. R. 139.

(*g*) Harg. Note (13) ibid. Read *v.* Burley, Cro. Eliz. 550.

(*h*) Welch *v.* Bell, 2 Keb. 529, 596. S. C. 1 Sid. 422, 440.

(*i*) Simpson *v.* Hartopp, Willes, Rep. 517.

actual use; but if put off, though only for the purpose of repose, it is liable to be taken as a distress for rent. (*c*)

Nor of things in the way of trade.

Thirdly, "Valuable things in the way of trade are not liable to distress. As a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house, or corn sent to a mill or market. For all these are protected and privileged for the benefit of trade."(*d*) But these general rules must be understood with some limitations. For although the goods of a guest at a public inn are privileged from distress, because such a place is *publici juris*, and all men have a right to use it without molestation:(*e*) yet this exemption was held not to extend to the case of a chariot, standing in the coach-house of a livery stable keeper: for that is not a common inn, and the hire of its standing may be considered as part of the profits of the premises.(*f*) The goods to be exempted from distress, must also be within the very precincts of the inn, and not on other premises at a distance belonging to it.(*g*) And even within the inn itself, the exemption does not extend to the goods of a person dwelling therein as a tenant, rather than a guest.(*h*)

For the general benefit of trade, it has been determined, that goods carried to be weighed, even at a private beam, if in the way of trade; or a horse that has carried corn to a mill to be ground, and during the grinding of the corn is tied to the mill door; are privileged from distress for rent. (*i*) So goods in a public fair cannot be distrained unless it be for toll due from their owner;(*k*) nor a horse which carries corn to a market, and is placed for a time in

(*c*) Bissett *v.* Caldwell, and Baynes *v.* Smith, 1 Esp. 206. S. C. Peake's Cases, 36. Hunt's Gilbert, 49.

(*d*) Bl. Comm. V. 3. p. 8.

(*e*) Robinson *v.* Walter, 3 Bulstr. 269.

(*f*) Francis *v.* Wyatt, 3 Burr. 1498. S. C. Bl. Rep. 483.

(*g*) Croser *v.* Thomlinson, Barnes, 472. cited Burr. 1500.

(*h*) Francis *v.* Wyatt, Bl. Rep. 484. Hunt's Gilb. 40.

(*i*) Read *v.* Burley, Cro. Eliz. 549, 596.

(*k*) Osbuston *v.* James, 2 Lutw. 1880.

a private yard;(*l*) but if cattle be put to stand or depasture in a place in their way to the market, but remote from it, they may be distrained by the landlord for his rent; although he had notice of their being there, and consented to it; for such parol licence is no waiver of the right of distress, without an express agreement to that effect.(*m*) But if such consent be deceitfully given for the purpose of obtaining a distress, equity will relieve upon the ground of fraud. (*n*) Upon the same principle of the benefit of trade, goods are privileged from distress, whilst in the hands of a common carrier: and even a private person undertaking to carry them for hire, is *pro hac vice* considered as a carrier; and the goods are protected whilst they remain in his possession. (*o*) So also goods landed at a wharf, and deposited in a warehouse there, (*p*) cannot be distrained for the rent of the warehouse, and it is immaterial whether they are deposited by the principal or his factor.(*q*) So also, and for the same reason, goods of the principal in the hands of his factor, cannot be distrained by the landlord for the rent of the factor's premises. (*r*)

Of a Distress on the goods of a stranger.

In general, all goods found upon the premises demised, are distrainable for rent; whether they belong to the tenant or not; subject however to those rules of exemption relative to the nature of the things distrained, which belong to distresses in general. But with regard to a stranger's beasts which are found on the tenant's land, the following distinctions are taken. If they are put into the land by consent of their owner, or come in by breaking its fences, being in re-

(*l*) Read *v.* Burley, Cro. Eliz. 596.

(*m*) Fowkes *v.* Joice, 2 Vent. 50. S. C. 3 Lev. 260. S. C. 2 Lutw. 1161.

(*n*) S. C. Prec. Ch. 7. 2 Vern. 131. The learned editor of Saunders is of opinion that cattle belonging to a drover being put into the ground with the consent of the occupier, to graze only one night in their way to a fair or market, would not now be held liable to be distrained for rent. Wms. Saun. 2 vol. 289 a. note (7).

(*o*) Gisbourn *v.* Hirst, 1 Salk. 249.

(*p*) Francis *v.* Wyatt, Burr. 1498, 1502.

(*q*) Thompson *v.* Masheter, 1 Bing. 283.

(*r*) Gilman *v.* Elton, 3 B. & B. 75.

pair, or even its defective fences, where neither the tenant nor his landlord is bound to repair them, they are immediately distrainable for rent arrear: but if they come in through defective fences, which the tenant or his landlord is bound to repair, the lord cannot distrain them for service, until they have been levant and couchant on the land; nor can the lessor distrain them for rent, (although they may have been levant and couchant, and even have remained on the land for several days) until after notice given to their owner to remove them. This rule, however, is said not to apply to the grantee of a rent-charge, nor to the lord of the fee distraining for an ancient rent; who may in such case distrain the cattle after they have been levant and couchant: (*s*) but if before that time, the owner pursue and retake them, they will be saved from the distress. (*t*) And where such cattle was distrained for a rent-charge twenty years in arrear, equity relieved against it. (*u*)

Implements of Trade and Husbandry, &c.

Fourthly, The tools and utensils of a man's trade, the implements of husbandry, beasts of the plough and sheep are also privileged from distress, not only while in actual use, but whilst any other sufficient distress can be found on the premises. (*x*) This rule however applies only to distresses

(*s*) 1 Roll. Abr. 668, 669. Gill *v.* Gawin, 2 Roll. Rep. 124. Kimp *v.* Cruwes, 2 Lutw. 1577. S. C. Ld. Raym. 168. Anonymous, 2 Leon. 7. Bl. Comm. 3. p. 8, 9. Harg. note (3) Co. Litt. 47 b. Wms. Saund. 289. note (7).

(*t*) Fowkes *v.* Joice, 2 Vern. 131.

(*u*) Bro. Distr. pl. 21.

(*x*) Co. Litt. 47. (*a*) Stat. de district. Scac. 51 Hy. 3. st. 4. Gorton *v.* Fawlkner, 4 T. R. 565. The rule of exempting beasts of the plough from distress, whilst any other distress could be fouud, seems not to have owed its birth to the statute of 51 Hy. 3. but to have been as ancient as the common law itself. And this rule appears, from Britton and the Mirror, as cited by Lord Coke, 2 Instit. 132, 133, to have been afterwards extended to armour, domestic utensils, apparel and jewels. Saddle horses also were exempted, probably on the distinction adopted by Bracton, lib. 4. fol. 217. between the *animalia laboriosa et otiosa*, and this privilege seems to have been still recognized in the time of Rolle. See Abrige. p. 667. pl. 24. p. 661. pl. 16. And semble that it extends to the case of a distress for rent, as well as any other debt due to the King, Dalis Rep. 84. Et Pasch. 15 Eliz. rot. 56. cited by Dyer 312 in margine.

for rent in arrear, amerciaments, &c.: but not to distresses under particular statutes; which are rather in the nature of executions: and such things may therefore be distrained for poor's rates. (*t*) Nor does this rule extend to a distress for damage-feasant; (*u*) or a distress made for a toll or duty, arising in respect of the thing distrained, and other things connected with it. As for distraining two sheep out of a flock, by the owner of a market, for the toll due in respect of the whole flock. (*x*) Or taking the anchor, sails and cables of a ship, as a distress for the port duty due for the vessel. (*y*)

No Distress of Perishable Goods.

Fifthly, As a distress was anciently regarded only as a pledge, to be restored upon the performance of the duty for the default of which it was taken; it became a rule, that those things only should be distrained which could be removed and restored in as good plight as that in which they were taken. (*z*) And therefore at the common law, fruit, milk and other things of a perishable nature, could not be distrained: (*a*) nor money, unless in a bag, because the identical pieces could not be known. (*b*) Neither could grain or flour be taken out of a sack, or hay from a barn; because the quantity taken could not be ascertained: (*b*) nor corn in the sheaf; because the grain must be shed and scattered by removal, unless indeed it were found in a cart, in which it could be removed without further injury or loss. (*b*) But this, as we have before seen, is now altered by stat. 2 W. & M. c. 5. s. 3. which enables any person to distrain for rent, sheaves or cocks of corn, or corn loose or in the straw, or hay in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land charged with such rent. This provision is held to extend to corn in whatever

(*t*) Edgecomb *v.* Sparks, 2 Show. 126. Anonym. 3 Salk. 136. Hutchins *v.* Chambers, 1 Burr. 579.

(*u*) Com. Dig. Distress, B. 4.

(*x*) Osbuston *v.* James, 2 Lutw. 1380 Smith *v.* Shepherd, Cro. Eliz. 710.

(*y*) Vinkenstone *v.* Ebden, Lord Raym. 384. S. C. 1 Salk. 249,

(*z*) Gilb. Distr. p. 34.

(*a*) Bl. Comm. 3. V. 9.

(*b*) 1 Roll. Abr. 667.

CHAP. XI.

state it may be, whether threshed or unthreshed: (*e*) and as this statute directs the distress to be sold within five days unless replevied, perhaps the rule of the ancient common law with respect to the perishable nature of the distress, no longer extends, in the case of a distress for rent, to any thing which is not liable to deterioration within the period prescribed by the statute for the sale of the goods distrained.

Nor of things annexed to the Freehold.

Sixthly, Things which are affixed or annexed to the freehold, as furnaces, cauldrons, windows, doors and the like cannot be distrained; because they are not personal chattels, but belong to the realty. (*f*) And this rule extends to such things as are essentially parts of the freehold, although for a time removed therefrom, as a millstone removed to be picked; for this is a manner of necessity, and it still remains, in contemplation of law, a part of the frehold. (*g*) And therefore the anvil of a smith fixed in his shop cannot be distrained; (*g*) nor a lime kiln, which is considered not to be a personal chattel, but belonging to the freehold. (*h*) Upon the same principle, growing corn could not be distrained at the common law; (*i*) but this rule, as I have before stated, is now altered by stat. 11 Geo. 2. c. 19. s. 8. by which, landlords or lessors to whom rent is in arrear, are enabled to take and seize all sorts of corn and grass, hops, fruits, roots, pulse, or other product whatsoever, which shall be growing on any part of the premises demised, as a distress for such rent. It has however been held, that the word *product* is confined to products of a similar nature with those specified in the statute, to all of which the process of becoming ripe, and of being cut, gathered, made and laid up, when ripe is incidential; and therefore does not extend to trees, shrubs, and plants growing in a nursery ground. (*k*)

Growing crops distrainable.

Or in the custody of the Law.

Lastly, Those things cannot be distrained which are al-

(*e*) Bellasis *v.* Burbage, 1 Lutw. 214.

(*f*) Co. Litt. 47 b.

(*g*) Bro. Abr. Distress, pl. 23. Gorton *v.* Fawlkner, 4 T. R. 567

(*h*) Niblet *v.* Smith, 4 T. R. 504.

(*i*) 1 Roll. Abr. 666.

(*k*) Clark *v.* Gaskarth, 8 Taunt. 431. 3 Moore. 96.

ready in the custody of the law; because the distrainor cannot legally take them into his own possession. (z)

(z) Vide ante, chap. 4.

CHAPTER XII.

Of the Manner in which a Distress should be made, and afterwards disposed of.

THE proceedings on a distress are regulated partly by the rules of the ancient common law, and partly by statute. But the remedy of distress for rent has been so materially altered and extended by the provisions of some modern statutes, and thereby rendered so different in its proceedings from all other distresses, that it will be proper to consider them separately: and for this purpose, to inquire, first, into the manner of proceeding on a distress for rent; and secondly, of proceeding on a distress for other causes.

Of proceeding on a Distress for Rent.

Distress made by the landlord.

A distress for rent may be made either by the person to whom it is due, or by his bailiff, that is, an agent authorized by him to make the distress. If made by the person himself to whom the rent is due, whether he be the lord distraining for a rent-service, or the grantee of a rent-charge, or the lessor distraining for rent reserved on lease, no particular form is required for making the distress. The most proper way of making it, is however for the landlord

he premises demised, and take hold of some niture, or other personal chattel found thereon, take this table, (or whatever else it may be) in of all the other goods on these premises, as a dis- the sum of £———rent, due to me at——— st.

By his bailiff.

the distress be made by a bailiff, he should be properly authorized to make it: for which purpose, the landlord should give to his bailiff a written authority, (or as it is usually termed a warrant of distress) which may be in the following form. (*a*)

Warrant of distress.

I hereby authorize and require you to distrain the goods and chattels in the dwelling house, (or "in and upon the farm lands and premises") of A. B. situate at———in the county of———, for———£, being———year's rent, due to me for the same, at———last; and to proceed thereon, for the recovery of the said rent, as the law directs. Dated the——— day of——— 18——

Yours, &c.

To E. F. my bailiff. C. D.

Neither the warrant of distress, nor indeed any other of the proceedings in making a distress, requires a stamp, or to be under seal, although made by a corporation aggregate; (*b*) but the warrant must be signed by the person entitled to the rent, under whom the bailiff may afterwards justify, (or as it is termed, make cognizance) for the distress in the replevin: in the case of a joint distress, as by coparceners, the warrant must be signed by all the persons entitled to distrain. (*c*)

If however a person distrain as bailiff to another, the distress will be good, although he did so without authority,

(*a*) I am not aware of any authority to shew that the bailiff must have a *written* warrant of distress; although it is certainly the most eligible mode of appointment, as being the most easily proved, Vide stat. Westm. 2. 13 Ed. 1. c. 37.

(*b*) Anonymous, 1 Salk. 191.

(*c*) See ante, p. 55.

provided the act be subsequently adopted by the party, in whose behalf the distress was made; but if in the first instance he make the distress in his own name, he cannot afterwards protect his unlawful act, by declaring that he did so as a bailiff or agent. (*d*)

When the bailiff is thus provided with the requisite authority, he may proceed to make the distress in the same manner as before prescribed for the landlord; only expressing, that he makes the distress as the bailiff of the landlord, for rent due to him, and by virtue of an authority given to himself by the landlord for that purpose. For if the bailiff be required to shew the cause of making the distress, he ought to do it; but if not required so to do, he may distrain generally. (*e*)

Of the notice and inventory.

As the distress may be made on all, or only on a part of the tenant's goods, (*f*) it is proper that he should know what goods the landlord intends to comprize within the distress; that he may know what he will be obliged to replevy. And for this purpose, as soon as the distress is made, whether by the landlord or his bailiff, an inventory of the goods distrained should be prepared in the following form.

An Inventory of the several goods and chattels distrained by me C. D. (or "E. F." the bailiff) the ——— day of ——— in the year of our Lord, 18——, in the dwelling house, (&c.) of *A. B.* situate at ——— in the county of ———, (and if the distress be made by a bailiff, say "by the authority and on the behalf of "C. D.") for the sum of ——— £ being —— year's rent due to me, (or,) "to the said *C. D.*") at ——— last.

IN THE DWELLING-HOUSE.

In the parlour, one table, (&c.)

(*d*) Godb. 109. Potter *v.* North, 1 Saund. 347 c. n. (4). and the cases there cited.

(*e*) Buller's case, 1 Leon. 50.

(*f*) For if the landlord tortiously make an excessive distress, he will be liable to the penalties of the statute of Marlebridge, for which see post. ch. 13.

To this inventory should be subjoined the following notice to the tenant (*g*)

Mr. A. B.

Take notice, that I have this day distrained (or "that as bailiff to C. D. your landlord, I have this day distrained") on the premises above mentioned, the several goods and chattels specified in the above inventory, for the sum of ———*l.* being ——— year's rent due to me, (or "to the said C. D.") at ——— last, for the said premises; (*h*) and that unless you pay the said rent, with the charges of distraining for the same, within five days from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand, the —— day of ——— in the year of our Lord, 18—.

Witness,

R. S. C. D.

The following form is applicable to the case of a distress for a rent-charge.

Take notice, that by the order, and on the behalf of C. D. I have this day taken and distrained in and upon the farm and lands, called ——— in your occupation, in the parish of ——— in the county of ——— all the corn, grain, and effects in the inventory here under mentioned, for the sum of ——*l*. being ——year's annuity or rent-charge of ——*l.* per annum, due to the said C. D. at ——— last, and charged on and issuing and payable out of certain manors, farms, lands, and premises called ——— in the parish of ——— in the county of ——— aforesaid, of

(*g*) Esp. Ni. Pri. 419.

(*h*) If the distrainor secure the goods on the premises, under the authority of the 10th section of the stat. 11 Geo. 2. c. 19. the following clause may be introduced into this part of the notice ("and "have secured the said goods and "chattels in the stable, &c. on the "said premises.")

But if the distress be of growing crops under the 8th and 9th sections of the same statute, the notice must of course be of a different kind. See post.

which the farm and lands first above mentioned are part and parcel, and that unless the said arrears of the said annuity or rent-charge, together with the expences of this distress, are paid and satisfied, the said corn, grain, and effects will be disposed of according to law. Dated (&c.)

E. F.

To Mr. A. B. and all whom it may concern.

This notice of distress is preparatory to the sale of the goods, if not replevied, according to the stat. 2 W. & M. c. 5. s. 2. by which it is enacted, that where any goods shall be distrained for rent due upon any demise, lease, or contract, and the tenant or owner of the goods so distrained, shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same with sufficient security to be given to the sheriff according to law; that after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken, (who are thereby required to be aiding and assisting therein) cause the goods so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are thereby empowered to swear) to appraise the same truly, according to the best of their understandings; and after such appraisement, shall and may lawfully sell the goods distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods shall be distrained, and of the charges of such distress, appraisement, and sale: leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use.

The right of the tenant to replevy continues until the time of the actual sale, notwithstanding the expiration of the five days, and the removal and appraisement of the goods.

The notice of taking the distress is not required by the statute to be in writing; and therefore a parol notice may

CHAP. XII.

be given, either to the tenant of the premises, or the owner of the goods distrained. (*i*) And although such notice is directed by the statute to specify the cause of the taking, it is not material whether it accurately state the period of the rent's becoming due, (*k*) or even whether the true cause of taking the goods be expressed therein, since a man may distrain for one cause, and justify for another. (*l*) If the notice be not personally given, it should be left in writing at the tenant's house, or according to the directions of the statute, at the chief mansion-house, or other most notorious part of the premises charged with the rent.

Of removing the distress.

As soon as the distress was made, it was formerly by the common law, the duty of the distrainor to remove the goods from the premises within a convenient time; and by the effect of the statute of 2 W. & M. c. 5. unless the goods distrained were corn, hay, or straw, it was necessary to remove them immediately, (*m*) in order to impound them in some other place of safety: and the distrainor may still do so, if he think fit, giving notice to the tenant or owner, of the place to which they are conveyed. But now by the 10th section of the stat. 11 Geo. 2. c. 19. the distrainor is authorized to impound the goods distrained on any convenient part of the tenant's ground, to remain there during the space of five days, when they are to be sold, unless sooner replevied by the tenant. (*n*)

Where goods are so impounded upon the premises, and not replevied, the landlord is not bound to remove them immediately on the expiration of the five days; but is allowed a reasonable time beyond that period to sell and dispose of them. (*o*) If, however, he suffer them to remain beyond such reasonable time, without the consent of the tenant, he

(*i*) Walker *v.* Rumbold, 12 Mod. Rep. 76.

(*k*) Moss *v.* Gallimore, Doug. 279.

(*l*) Godb. 109, 110. Groenvelt *v.* Burwell, 1 Ld. Raym. 454, 466. Butler and Baker's case, 3 Co. 26.

(*m*) Crowther *v.* Ramsbotham, 7 T. R. 654. Etherton *v.* Popplewell, 1 East. 142. sed vide Buller's case, 1 Leon. 50.

(*m*) Dod *v.* Monger, 6 Mod. Rep. 215.

(*n*) Stat. 2 W. & M. c. 5. 11 Geo. 2. c. 19.

(*o*) Pitt *v.* Shew, 4 B. & A. 208.

becomes a trespasser. (*p*) And it seems advisable when the terms of the stat. of 11 Geo. 2. c. 19. are not strictly complied with, by impounding the goods on some convenient part of the premises, but the same are suffered to remain dispersed over different parts of them, that the express consent of the owner to their so remaining should be obtained, as it was held in a case before Lord Mansfield, where on a distress of household furniture, which remained untouched in different apartments, which during the five days were visited by the bailiff, that without the implied assent of the owner, he was liable to an action of trespass. (*q*)

As it is in many cases desirable for the tenant that the goods should not be sold so soon as the law permits, it is very usual for him to sign an agreement or consent to their remaining for a longer time on the premises, in the custody of the distrainor or a person by him appointed for that purpose. Such consent it is most proper, though not absolutely necessary to have in writing, and may be made in the following form.

Memorandum, that I, A. B. do hereby consent and agree, that C. D. my landlord, who hath distrained my goods and chattels for rent, in a dwelling-house, (&c.) situate at ——— in the county of ——— shall continue in possession of my said goods and chattels in the said dwelling-house, (&c.) for the space of —— days from the date hereof; the said C. D. having agreed to forbear the sale of the said goods and chattels for the said space of time, to enable me to discharge the said rent: and I the said A. B. do hereby agree to pay the expences of keeping the said possession. As witness my hand, the —— day of ——— in the year of our Lord, 18—.

A. B.

If such consent be given on the part of the tenant, then

(*p*) Griffin *v.* Scott, Ld. Raym. 1424. S. C. 2 Stran. 717. Winterbourne *v.* Morgan, 11 East. 295.

(*q*) Washborn *v.* Black, cited in Winterbourne *v.* Morgan, 11 East. 395. The evidence in this case of implied consent was, that the plaintiff said, how much she was obliged to Mr. *M.*, who had acted like a gentleman.

CHAP. XII.

the goods should not be sold until the expiration of the time agreed upon, but otherwise, the stat. 2 W. & M. c. 5. directs them to be sold at the expiration of five days after the distress, in the manner therein prescribed. (*r*)

Upon this clause of the statute it has been decided, that the five days may be inclusive of the *day* of sale, but must be exclusive of the *time* of it; so that, where the distress was made on the morning of the 12th May, and the sale in the afternoon of the 17th, it was held to be regular: because the five days expired on the morning of the latter day. (*s*)

Of the Appraisement and sale.

Before the goods are sold, the statute requires them to be appraised by two sworn appraisers, (whom the sheriff, undersheriff, or constable may swear) but as this enables only the constable having jurisdiction in the place where the distress is made, to administer such oath, in the case last cited, where the goods were distrained in the parish of A. but the appraisers were sworn before the constables of the parish of B. (both parishes being within the same hundred, but in different divisions, and each parish having different constables) it seems to have been doubted, whether this were a compliance with the requisitions of the statute. (*s*) But where a distress was made for the rent of land, part of which was situate in the hundred of Kinasley, in Wiltshire, and the remainder in the hundred of Andover, in the county of Southampton, and the two appraisers were sworn only in the hundred, and by the constable of Kinasley, but in the presence of the constable of Andover, it was held to be good; because the distress was entire, and all the goods being impounded in the hundred of Kinasley, the impounding there was but a continuance of the original taking in both the hundreds; (*u*) and as the goods were all impounded in the hundred of Kinasley, the constable of that hundred was the proper officer within the statute. (*x*)

(*r*) V. ante, p. 153.

(*s*) Wallace *v.* King, 1 H. Bl. 13.

(*u*) Walker *v.* Rumbold, Ld. Raym. 53. S. C. 12 Mod. 76.

(*x*) S. C. 4 Mod. 395.

The persons chosen as appraisers must not be interested in the distress, and therefore where the party distraining was chosen one of them, it was held to be bad. (*y*)

The oath may be administered to the appraisers in the following form.

You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory, (the constable at the same time holding the inventory in his hand, and shewing it to the appraisers) according to the best of your judgment. So help you God.

This oath should be administered in the presence of some person who may afterwards attest it; for which purpose it is usual to make a memorandum thereof as follows:

Memorandum, that on the —— day of —— in the year of our Lord, 18—, G. H. of ——and J. K. of two sworn appraisers, were sworn upon the holy evangelists, by me, L. M. of —— constable, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of their judgment. As witness my hand.

L. M. Constable.

Present at the time of swearing the said G. H. and J. K. as above, and witness thereto, } N. O. P. Q.

To which should be added the appraisement as follows.

We the above named G. H. and J. K. being sworn upon the holy evangelists, by L. M. the constable above named, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of our judgment; and having viewed the said goods and chattels, do appraise and value the same at the sum of ——*l.* As witness our

(*y*) Bull. Ni. Pri. 81.

hands, the ——— day of ——— in the year of our Lord, 18—.

Witness,

R. S. G. H.

J. K.

Sworn appraisers. (z)

The memorandum of the oath and the appraisement are usually written on, or subjoined to the inventory.

The next thing to be done is to search the sheriff's office, to see if the goods have been replevied, and if they have not, and the rent and charges are still unpaid, then to sell the goods after they have been appraised in the manner before mentioned, for the best price that can be got for them: and apply the whole produce, if necessary, in satisfaction of the rent, and the expences of the distress, appraisement, and sale: or if there be any overplus, to leave the same in the hands of the sheriff, under-sheriff, or constable, for the use of the owner of the goods distrained.

"When the goods are valued, it is usual for the appraisers "to buy them at their own valuation; and a receipt at the "bottom of the inventory witnessed by the person who swore "them is usually held a sufficient discharge."

"But if the distress be of considerable value, it is much "more advisable to have a proper bargain and sale, between "the landlord and the person who swears them, the ap-"praisors, and the purchasor, for the better proving the "transaction afterwards, if there should be occasion. (a)"

Of the expences of a distress.

The landlord is the person primarily liable for the necessary expences of a distress; and an undertaking by any other person to pay them, is consequently within the provision of the Statute of Frauds, and will not be binding upon

(z) The reader will readily perceive that in this and the preceding forms of this chapter, I have adopted those given by Mr. Tidd, in the last edition of his Practical Forms. I was indeed happy to borrow any thing, however trifling, from the pen of that valuable writer.

(a) Hunt's Gilbert, 328.

the party without a note in writing. (*b*) The amount of these expences is not regulated by any statutory provision, where the rent distrained for amounts to or exceeds the sum of 20*l.*, but must be reasonable according to the circumstances of the particular case. Where, however, the rent distrained for does not amount to that sum, the expences are limited by the stat. 57 Geo. 3. c. 93. to the following charges (that is to say),

	£	s.	d.
Levying distress	0	3	0
Man in possession, per day . . .	0	2	6
Appraisement, whether one broker or more, 6*d.* in the pound on the value of the goods			
Stamps, the lawful amount thereof .			
All expences of advertisements, if any such	0	10	6
Catalogues, and commission on delivering of the goods, 1*s.* in the pound on the net produce of the sale			

And any person offending against the provisions of this statute, is liable to a penalty of treble the amount of any sum illegally taken; the same to be recovered by distress and sale in a summary manner before a justice of the peace.

Where the Goods are taken in execution.

I have before observed, that things taken in execution cannot be distrained, because they are already in custody of the law; if therefore the goods of the tenant are already taken under legal process, the landlord must not attempt to distrain them, but must give notice to the sheriff of his claim for rent, under the stat. 8 Anne, c. 14. Such notice may be as follows.

To *A. B.*, Esq. sheriff of the county of ———

I do hereby give you notice, that there is now due to me from *C. D.* the person to whom certain goods belong, of which you are now in possession under and by virtue of a writ of *fieri facias*, (or as the case may be) returnable on

(*b*) Colman *v.* Eyles, 2 Star. 62.

CHAP. XII. ———, the sum of ——*l.*, for the rent of one year, (or other less period of time) and which sum I hereby give you notice to pay to me before such goods be removed from the premises. Dated this —— day of ———

E. F. Landlord of the said premises.

This notice however, can only be given by the immediate landlord, for the statute of Anne does not entitle a ground landlord to his rent out of the goods of the under-tenant taken in execution. (*b*) But where the landlord is entitled to rent under this statute, he must give notice of it to the sheriff, who is not otherwise bound to retain the rent on his account. (*c*)

Of a distress in case of fraudulent removal.

I have hitherto considered the mode of conducting a distress, where the goods to be distrained are found on the premises out of which the rent issues: but there is another course of proceeding to be adopted in those cases where the goods are fraudulently removed from the premises, in order to prevent a distress. The two statutory provisions on this subject, as I have before had occasion to observe, are those contained in the stat. 8 Anne, c. 14. s. 2. and 11 Geo. 2. c. 19. s. 1. by which, in the case of a fraudulent removal of the tenant's goods, the landlord or lessor is empowered, within thirty days after such removal, to take and seize them as a distress, wherever they may be found, and afterwards to sell or dispose of them, in the same manner as if they had been distrained on the premises demised, (that is to dispose of them according to the stat. 2 W. & M. c. 5.) unless before that time sold to a *bonâ fide* purchaser. And a penalty is imposed on those assisting in such fraudulent concealment or removal, of double the value of the goods so concealed or removed: "provided, that in case such goods do not exceed "the value of fifty pounds, the landlord or his agent may "exhibit a complaint in writing against such offender or "offenders before two or more justices of the peace of the "same county, riding or division of such county, residing

(*b*) Bennet's case, 2 Stra. 787.

(*c*) Waring *v.* Dewberry, 1 Stra. 97. Palgrave *v.* Windham, Id. 214. Darling *v.* Hill, Cas. Temp. Hard. 255

"near the place whence such goods and chattels were re-
"moved, or near the place where the same were found, not
"being interested in the lands or tenements whence such
"goods were removed; who may summon the parties con-
"cerned, examine the fact, and all proper witnesses upon
"oath, or if any such witness be one of the people called
"Quakers, upon affirmation required by law; and in a sum-
"mary way determine, whether such person or persons be
"guilty of the offence, with which he or they are charged;
"and inquire in like manner of the value of the goods and
"chattels by him, her, or them respectively so fraudulently
"carried off or concealed as aforesaid; and, upon full proof
"of the offence, by order under their hands and seals, the
"said justices of the peace may and shall adjudge the of-
"fender or offenders to pay double the value of the said
"goods and chattels, to such landlord or landlords, his, her,
"or their bailiff, servant, or agent, at such time as the said
"justices shall appoint. And in case the offender or of-
"fenders, having notice of such order, shall refuse or neg-
"lect so to do, may and shall by warrant under their hands
"and seals, levy the same by distress and sale of the goods
"and chattels of the offender or offenders; and for the want
"of such distress, may commit the offender or offenders to
"the house of correction, there to be kept to hard labour,
"without bail or main prize, for the space of six months,
"unless the money so ordered to be paid as aforesaid shall
"be sooner satisfied."

By the succeeding section, a right of appeal is given from such order to the justices of the quarter sessions, who are authorized to give costs to either party, and whose determination is to be final; provided, that where the party shall enter into a recognizance with sufficient surety, in double the sum ordered to be paid, with condition to appear at the quarter sessions, such order shall not be executed against him in the mean time.

The seventh section, as I have before stated, (*o*) provides that where the goods fraudulently removed, shall be locked

(*o*) V. ante, p. 137.

CHAP. XII.

up or secured in any house, barn, stable, outhouse, yard, close or place, the landlord or his bailiff may break open, seize and distrain them, first calling to his assistance the constable, headborough, borsholder, or other peace officer, and in case of a dwelling-house, oath being first made before a justice, of a reasonable cause to suspect that such goods are concealed therein. (*p*)

Distress of Corn, Hay, or Straw, under stat. of Wm. & Mary.

Before we proceed to consider the general duty of the party distraining, with regard to impounding the distress, it will be proper to take notice of the provisions of two statutes, which have rendered certain things distrainable, which were not so at the common law; but at the same time, have directed them to be disposed of in a particular manner. I mean the third section of the statute of 2 W. & M. ch. 5. s. 3. which enables the person to whom rent is due on any demise lease or contract, to seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying in a barn or granary, or on a hovel stack or rick or otherwise upon any part of the land or ground charged with the rent, and to lock up and detain the same in any place where the same shall be found, and after appraisement, authorizes the sale of the goods, if not replevied: provided that corn, grain or hay so distrained, be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized; but be kept there (as impounded) until the same shall be replevied or sold, in default of replevying the same within the time aforesaid.

Distress of growing Crops under stat. 11 Geo. 2. c. 19.

The other provision to which I allude, is contained in the 8th & 9th sections of the stat. 11 Geo. 2. c. 19. authorizing the landlord or lessor to take and seize all sorts of corn and grass, hops, roots, fruits, pulse or other product growing on any part of the premises demised, as a distress for arrears of rent; and the same to cut, gather, and lay up, when ripe, in the barn or other proper place on such pre-

(*p*) See in Burn's Justice, tit. Distress, the forms applicable to proceedings before a justice of the peace, under these clauses of the statute relative to a fraudulent removal.

mises; and in case there shall be no barn or proper place on the premises, then in any other barn or proper place, which such lessor or landlord shall procure for that purpose, and as near as may be to the premises, and in convenient time to appraise sell or otherwise dispose of the same, towards satisfaction of the rent, and of the charges of such distress appraisement and sale, in the same manner as other goods may be seized, distrained and disposed of; the appraisement thereof to be taken when cut and gathered, &c. and not before.

Provided, that notice of the place where the goods so distrained shall be lodged or deposited, shall, within the space of one week, after the lodging or depositing thereof be given to such lessee or tenant, or left at the last place of his abode; and that if after such distress, and at any time before the crops distrained shall be ripe and cut, the tenant, his executors, &c. shall pay to the lessor or landlord, or his steward or other person usually employed to receive the rent of such lessor or landlord, the whole rent in arrear, together with the costs and charges of the distress; that then upon such payment or lawful tender thereof actually made, such distress shall cease, and the things so distrained shall be delivered up to the tenant.

The reader will observe, that in this case of a distress of growing crops, the notice of the place where the goods are deposited must be given to the tenant, or left at his last place of abode, within one week after such deposit; but of course is not to contain any notice of sale. It is sufficient that it specify the cause of the taking, and the place where the goods are lodged.

Of Impounding the Distress

Having premised these two exceptions to the general law which prevails with regard to the impounding of the distress, we may proceed to consider, what is in other cases, the duty of the distrainor in this respect. "At common law, a man "might have impounded his distress in what county he "pleased; but this was found very inconvenient to the "owner, who was thereby at a loss where to find his beasts "either to feed or replevy them. This mischief was there-"fore provided against by the statute of Marlebridge, ch. 4.

CHAP. XII. "*Nullus de cætero faciat ducere districtiones quas fecerit, "extra comitatum in quo captæ fuerint.*"

"Yet upon this statute it hath been held, that where the "tenancy is in one county, and the manor in another, the "lord may drive the distress to the manor pound, though it "be out of the county where the distress was taken; because "the tenant by attending the manor court, is presumed "to know every thing transacted in the manor; and there-"fore this case is out of the mischief provided against by "that law." (*q*)

The statute of Marlebridge confined the impounding of the distress to the same county, and by the later statute of 1 & 2 Ph. & M. c. 12. it is enacted, that no distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where such distress shall be taken, except to a pound overt, within the same shire, not above three miles distant from the place where such distress is taken. And that no other cattle, or other goods distrained for any cause at one time, shall be impounded in several places, whereby the owner of such distress shall be constrained to sue several replevies for the delivery of such distress: and that every person offending contrary to that act, shall forfeit to the party grieved, for every such offence, a hundred shillings and treble damages. And by the same statute it is further enacted, that no person shall take more than four pence for impounding a distress, and where less hath been used, shall take less, under a penalty to the party grieved of 5*l.* together with the excess of the sum taken.

As this statute expressly enjoins the distress not to be driven out of the county, it cannot be carried into another county, although it be to the nearest pound, and within three miles from the place of the distress. (*r*) But where one distress was made for an entire rent, issuing out of two adjoining parcels of land, in different hundreds and different counties, there in respect of the distress being entire, it was held that the goods distrained in both hundreds, might

(*q*) Gilb. Distr. p. 70. 2 Inst. 106.

(*r*) Woodcroft *v.* Thompson, 3 Lev. 48. Gimbart *v.* Pelah, Stra. 1272.

properly be impounded in one of them. (*t*) If however the entire rent had issued out of two parcels of land, situate in different counties, not adjoining to each other, as *Middlesex* and *Hampshire*, the distress could not have been driven from one to the other. (*t*) And where the distress was made in the hundred of *Offlay* in *Staffordshire*, and afterwards impounded within the city of *Lichfield;* (which was formerly within the hundred, but was afterwards by letters patent made a county of itself;) it seems to have been considered as irregular within this statute. (*u*) But as it is said that a general statute does not repeal a particular prescription, if a manor in one county be held of a manor in another county, the lord may prescribe to drive the distress from the one to the other. (*x*) And where a distress was made in *Wiltshire*, in a place within the honour of *Wallingford*, which is in the county of *Berks*, and afterwards driven into *Berkshire*, it seems to have been held good. (*y*)

Very few cases have however arisen under this statute, with respect to carrying the distress to a distant pound, since the act of the 11 Geo. 2. c. 19. the 10th section of which authorizes any person lawfully taking a distress *for any kind of rent*, to impound or otherwise secure the distress, of what nature or kind soever, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the same, and to appraise, sell and dispose of it as might before have been done, in the case of a distress taken off the premises; and that any persons may go to such place or part of the premises, in order to view, appraise and levy the goods distrained, and carry off or remove the same, on account of the purchaser thereof.

The Pound, or inclosure in which the goods distrained are to be deposited, is either a pound overt, or a pound covert. The former is a pound the sides of which are partly

(*t*) Walker *v.* Rumbold, Ld. Raym. 53. S. C. 12 Mod. 76.

(*u*) Gouldsb. 100.

(*x*) Knolls *v.* Soley, Palm. 544. arguendo, Bro. Distr. pl. 32.

(*y*) Anonym. Dyer 168 b.

CHAP. XII. open, so as to permit the owner of the things distrained to see them, and if necessary, (as in the case of cattle) to have access to them, for the purpose of feeding and tending them. A pound covert is one covered at least overhead, and sometimes a complete inclosure.

If the things distrained be household goods, or any thing else capable of being damaged by the weather, or of being easily carried away, it is the duty of the distrainor to impound them in a house, or other inclosed place, in which they may be kept in safety, and free from damage: for if he put them into a pound overt, he must be answerable for them. (*a*) But cattle ought to be put into a pound overt; in which it is the duty of their owner to feed and tend them, for if they are put into a pound covert, (that is a complete inclosure, as a barn or stable) they must be sustained by the distrainor, who is not entitled to any satisfaction for the expence; and if they die for want of proper food and care, he must answer for them. (*a*) But if they are stolen from a pound overt, he is not answerable for them, because such a pound is a proper one for the impoundiug of cattle; (*b*) and if they die in a pound overt, without the distrainor's fault, he may make another distress. (*b*) But he must merely put the cattle into the pound, without attempting to confine them therein, in any manner by which they may be damaged, so that, if a horse leap over the pound, and he is afterwards tied within it by a rope, with which he strangles himself, the distrainor is liable to make satisfaction. (*c*) So if he put a horse into a pound with spikes, by which the horse wounds himself, it is said that the distrainor shall be liable, because even a public pound is, for the time being, the pound of the distrainor, and he shall therefore be answerable for its being a safe and proper one. (*b*) If cattle distrained die in the pound, or escape therefrom without the default of the distrainor, he may make a second dis-

(*a*) Co. Litt. 47 b.

(*b*) Vaspor *v.* Edwards, 12 Mod. 660. S. C. 1 Salk. 248. S. C. Ld. Raym. 719.

(*c*) 1 Roll. Abr. 673.

tress. (*f*) If cattle be impounded in a common public and open pound, it seems that the owner of them is bound to take notice of it; but if they are put into a private pound, then notice of the place of such impounding must be given to him by the distrainor. (*g*) And if the distrainor omit to give such notice he must feed them, or be amenable for their value if they die for want of food or care. (*h*) And in the case of a distress of growing crops, a particular notice, as we have before seen, is required by the stat. 11 Geo. 2. c. 19. (*i*) When the thing is impounded, whatever it may be, the distrainor cannot use or work it, whether it lie in a pound overt, or covert; because the distrainor has only the custody of the thing as a pledge, but has no right to make use of it; although the owner may make what profit of it he can, whilst it remains there. (*k*) The common law in this respect was so strict, that if the distrainor made any use of the distress, it rendered him a trespasser *ab initio*. (*l*) This is indeed now altered by the stat. 11 Geo. 2. c. 19. s. 19. but he is still liable to an action to recover damages for such abuse. And every use of the thing distrained is considered as an abuse of it, so that it cannot be justified, even by its being beneficial to the distress itself. For although it has been said, that where a man distrains armour, he may cause it to be scoured, to avoid rust; or if he distrain raw cloth, may cause it to be fulled, because it is for the owner's benefit; (*m*) yet in the same case it was decided, that raw hides could not be tanned, although alleged to have been done to preserve them from rotting. And the principle has been carried so far, that it seems to be the better opinion, that even milch kine cannot be milked by the distrainor, in order to prevent them from being damaged: because the owner would perhaps have come to milk his cattle before they had

(*f*) Vaspar *v.* Edwards, 1 Salk. 248. S. C. Ld. Raym. 719. Rex *v.* Cotton, Parker 112, 129. Foster *v.* Jackson, Hob. 52, 61.

(*g*) Co. Litt. 47 b.

(*h*) Perkins *v.* Butterfield, Het. 75.

(*i*) V. ante, p. 163.

(*k*) Gilb. Distr. 73.

(*l*) Dod *v.* Monger, 6 Mod. 216.

(*m*) Per Popham, J., Duncomb *v.* Reeve, Cro. Eliz. 783.

sustained any material injury; and it is not necessary for the security of the distrainor, who if the cattle die without his default, may make another distress. (*n*) This rule of not using cattle distrained does not however apply to beasts delivered *in withernam*, for these are delivered to a man in lieu of his own cattle eloigned. (*o*)

In the case of a distress of growing crops, it is (as we have seen) (*p*) expressly provided by the stat. 11 Geo. 2. c. 19. s. 9. that if the arrears of rent with the full costs and charges of the distress, be tendered to the party distraining before the crops are ripe and cut, cured or gathered, then the distress is to cease, and they are to be redelivered to the tenant. And in all cases of distress, if after making the distress, but before it is impounded, a tender be made of the arrears of rent due, together with the expences of the distress; the distrainor can no longer justify detaining the goods but must redeliver them to the tenant or owner. (*q*) And if he refuse to do so, as the impounding is altogether tortious, it seems that if the cattle die in the pound he is answerable for them. (*r*) The detainer is also unlawful, where the avowant hath return irreplevisable, and the owner of the beasts tenders all that appears to be due on the judgment in the avowry; for though by the judgment the return is made irreplevisable, yet that is no final condemnation of the beasts or goods distrained; which are still to be considered as pledges in the hands of the avowant, and therefore in their own nature liable to a redemption, upon payment or satisfaction of that rent or damage for which they were originally taken. (*s*)

(*n*) Roll. Abr. 673. and the cases cited in note (*a*) to Hunt's Gilb. Distr. p. 73. and see Parker's Rep. 122.

(*o*) Dyer 280. pl. 14. in margine.

(*p*) V. ante, p. 162.

(*q*) 2 Inst. 107. Six Carpenters' Case, 8 Rep. 146. b.

(*r*) Hunt's Gilb. 88.

(*s*) Hunt's Gilb. 89. Bull. N. P. 60. Roberts *v.* Young, 1 Brown. 173. Vaspor *v.* Edwards, 12 Mod. 661. Allen *v.* Bayley, 2 Lutw. 1596. Pilkington's Case, Co. 76. Anscomb *v.* Shore, 2 Camp. 285.

Of the manner of making and disposing of Distresses, taken for other causes than that of rent.

Of disposing of a Distress at Common Law.

As a distress, at common law, was only in the nature of a pledge, which could neither be used, nor disposed of for the profit of the party distraining; it is a general rule, that no distress at common law, except that for fines and amerciaments in a court-leet, can be sold, or in any other manner converted to the use of the distrainor. For the provisions of the act of William and Mary, and other later statutes, which authorize the sale of distresses for rent, extend only to that particular kind of distress: and all others therefore remain in this respect, as they were originally at the common law; and consequently cannot be sold or otherwise made use of, for the profit of the party distraining. The manner of disposing of them is therefore in general only to impound them, where they are to remain until replevied by their owner.

There are however some cases, in which by custom such distresses may be sold, and this happens most frequently where the distress itself is warranted only by custom, which authorizes both the distress and sale. Thus a distress *pro certo letæ*, can be made only by prescription or custom: (*o*) but the same custom may authorize the sale of such distress. And the same rule will apply to a distress for an amerciament made in a court-baron. (*p*) For in general a custom sufficient to warrant the distress, is sufficient to warrant its sale: this is not however universally true, for although a bye-law may authorize a distress to be made, it cannot authorize it to be sold. (*q*) So if a custom be alleged for the lord of a manor to detain a distress taken on his demesne lands, until he be paid a fine at his pleasure,

(*o*) V. ante, p. 119. Bullen *v.* Godfrey, 1 Roll. Rep. 76.

(*p*) Rex *v.* Speed, Salk. 379.

(*q*) Clark *v.* Tucket, 2 Vent. 183.

this cannot be supported, for such a custom is unreasonable and void. (r) But where a distress is made for a purpose of public benefit, as to punish a nuisance, it is said, that the power of distress shall be construed most favourably for the public advantage, and therefore the things distrained may be sold.(s) A similar observation may be applied to all cases in which a distress is made, not for the purpose of compelling the performance of a duty, but of enforcing the payment of a penalty or other specific sum of money: for otherwise the distress might be an ineffectual remedy. This rule however can extend to few cases, except those regulated by some particular custom, or where the distress is in the nature of an execution, in which latter case, it is commonly made under some statutory provision, which either expressly or by implication authorizes both the distress and the sale.(t)

Of impounding the Distress at Common Law.

The manner of impounding such distresses materially differs in one respect from that of a distress for rent; and may in some other cases depend on particular custom, varying from the mode prescribed by the common law. For all kinds of distresses are within the statute of 1 & 2 Ph. & M. c. 12. directing the distress to be impounded in a pound, within three miles from the place of the distress, and in the same county: but the statute of 11 Geo. 2. c. 19. s. 10. authorizing the distress to be impounded on any convenient part of the land distrained upon, extends only to distresses for rent; and therefore all other distresses must be regulated, as to the impounding, by the former statute of 1 & 2 Ph. & M. c. 12.(u) In some cases however, even by the ancient common law, a distrainor was entitled to impound the distress on the land: for it is said, that if the lord or lessor distrain beasts damage-feasant on his tenant's land, he may not impound them on the land itself; but if such distress be made on his own lands, then the cattle may be impounded

(r) The case of Tanistry, Dav. Rep. 33.

(s) Rex v. Speed, Salk. 379.

(t) Bl. Comm. 3, 14. and see Arris v. Bradshaw, 1 Keb. 733. Anonymous, Sir Thomas Jones, 25. 2 Inst. 738.

(u) For which, and the decisions upon it, see ante, p. 164. and post, chap. 13.

thereon.(*x*) And it should seem, that notwithstanding the statutes of Marlebridge, and 1 & 2 Ph. & M. which direct the distress to be impounded within the same county, yet where it is made for suit or service upon the land of a tenant in one county, held of a manor in another, the cattle distrained may be driven to and impounded in the latter county, within the manor: (*y*) because the tenant knows where he owes his suit and service, and can be at no loss to find or replevy his cattle; for as Lord Coke observes upon this point, a case which is out of the mischief of a law, is out of its meaning, although within the letter of it.(*z*)

Of Impounding by Custom.

In some cases, the manner and place of impounding may be regulated by particular custom; thus where it appeared to be the custom of a manor, for the bailiff, at certain times, to drive the tenant's cattle feeding on the waste, in order to ascertain whether any of them had surcharged the common, and if such surcharge were found, to distrain the cattle surcharging, as damage-feasant, and impound them in any place within the manor; it was held that such a custom was good. (*a*)

Of a Distress for a Fine or Amerciament in a Court-Leet.

In the case of a distress for a fine or amerciament at a court-leet, it appears to have been sometimes doubted, whether it were necessary for the bailiff to have a special warrant to make the distress; (*b*) but the better opinion seems to be that such a warrant is requisite. (*c*) And indeed as this distress is in its nature a process of execution on the judgment of a court, it is not reasonable that such process should

(*x*) Bro. Abr. Distr. pl. 30. ante, p. 166.

(*y*) Bro. Abr. Distr. 33, 54.

(*z*) 2 Inst. 106. As Lord Coke cites this case as law after the statute of Ph. & M. it seems that he considered it as not more effected by that act than by the statute of Marlebridge. Indeed the two acts were made *in pari materiâ*, and Lord Coke's reason applies equally to both of them. And see ante, p. 164.

(*a*) Follett *v.* Troake, Ld. Raym. 1186.

(*b*) Pierson *v.* Ridley, 2 Keble, 745.

(*c*) Scroggs *v.* Stephenson, Moore, 573. S. C. 607. S. C. Cro. Eliz. 698. Rowleston *v.* Alman, Id. 748.

CHAP. XII. be executed by any one, but an officer or bailiff of the court, delegated for that purpose.

This kind of distress, as I have already observed, differs in one respect from other distresses at common law, inasmuch as it may, if necessary, be sold; because it is in effect a species of execution to levy a certain penalty. There is indeed another reason, derived from the prerogative of the king, whose courts all leets originally were, and therefore its fines or amerciaments have been considered as debts due to the crown which might always be levied by distress and sale. (*d*) For the latter reason however it has been doubted, whether the private lord of a leet, can of common right, sell the distress made for a fine or amerciament in his court; because it has ceased to be the court of the king, and is therefore no longer effected by the prerogative: (*e*) but the better opinion seems to be, that whether the court-leet be in the hands of the king or a subject, such a distress may be sold. (*f*) It should however be detained for a reasonable time, which in this case is said to be about sixteen days, (*g*) to afford to the person distrained upon, an opportunity of redeeming or replevying his goods, which if not done during that time, the distress may at the expiration of it be disposed of by sale, in order to pay the amount of the fine or amerciament and the expences of the distress: the overplus (if any) to be rendered to the owner of the goods distrained. During the time of detaining such distress, it ought to be safely impounded, (*h*) according to the directions of the statute of Philip and Mary.

It must however be remembered, that this power of sel-

(*d*) Bro. Distr. pl. 72. Bl. Comm. 3, 14.

(*e*) Commin *v.* Carre, Hetl. 62.

(*f*) Ibid. and Hewett *v.* Norberow, 1 Bulstr. 53. Griesley's Case, 8 Rep. 41. Bro. Distr. pl. 40.

(*g*) Commin *v.* Carre, Hetl. 62. This period of fifteen or sixteen days seems to have been fixed upon from the analogy between a distress for an amerciament, and a distress for a debt due to the king or other lord; respecting which, the ancient statute *de districtione scaccarii* 51 Hen. 3. stat. 4. enacts that the distress shall not be sold within fifteen days.

(*h*) Griesley's Case, 8 Rep. 41.

ling the distress for a fine or amerciament, belongs only to a court-leet, but for an amerciament in a court-baron, the distress cannot be sold without a special custom or prescription to warrant such sale. (*i*)

Where several amerciaments are due for distinct offences, (as I have before observed) a distress should not be made for the entire sum, but each amerciament should be separately levied. (*k*)

(*i*) Trye *v.* Burgh, Noy 17. (*k*) Ante, p. 124.

CHAPTER XIII.

Of a wrongful, irregular, or excessive Distress, and of the several Remedies for the same.

A DISTRESS may be either wholly, or partially unlawful. It is indeed a rule of the common law, that any irregularity committed in the proceedings of a distress, renders the party distraining a trespasser *ab initio*; but this has been in vsrious instances modified by particular statutes appointing specific remedies for the injuries complained of, and (as I have before observed) in the case of a distress for rent, has been totally changed by the stat. 11 Geo. 2. c. 19, which establishes the more equitable principle, that the person aggrieved by any irregularity in the distress, shall be entitled to recover damages proportioned to the injury sustained.

For the purpose of considering the nature of illegal distresses, and the remedies provided for them, it will be convenient to divide them into three kinds, namely wrongful, irregular, and excessive distresses.

Of a wrongful distress.

A distress may be denominated wrongful, either by being tortious in its very inception or by being rendered so by its unlawful continuance. If therefore, a distress

be made by a person who has no right to make it, as by a landlord for rent, when in fact no rent is due, or a distress be unlawfully taken in the highway, it is so entirely wrongful, that the law permits the person whose goods are so distrained, to redress himself, by retaking them out of the hands of the trespasser; (*m*) and a distress being in the first instance, only a means of compelling satisfaction, if such satisfaction be tendered at the time the distress is about to be made, that renders the subsequent distress altogether wrongful. Thus, if a man come to distrain for rent in arrear or damage-feasant, and before the distress, a tender be made of the arrears of the rent, or sufficient amends for the damage with the costs (if any) of the distress; a subsequent distress is altogether tortious, and the tenant or owner may immediately rescue his property from the hands of the distrainor. (*m*) And if in the case of rent in arrear or damage-feasant, the person whose goods are distrained, do after the distress, and before the impounding, tender a sufficient satisfaction for such arrears or damage done, together with the charges of the distress, the subsequent detainer of goods becomes unlawful: and in such case it seems, that the owner of the goods may rescue them, without being deemed a trespassor: (*n*) but this must be done before any part of the goods is impounded, (*o*) as they are afterwards in the custody of the law. For as Lord Coke concisely expresses it, "Tender upon the land before "the distress, makes the distress tortious; tender after the "distress, and before the impounding, makes the detainer "and not the taking wrongful; tender after the impound-"ing, makes neither the one nor the other wrongful, for "then it comes too late, because then the cause is put to the "trial of the law, to be there determined." (*p*)

(*m*) Co. Litt. 47 b. 160 b. See further as to the right of rescuing a distress, post chap. xiv.

(*n*) Bevill's case, 4 Rep. 11 b. Firth *v.* Purvis, 5 T. R. 433.

(*o*) Alwayes *v.* Broome, 2 Lutw. 1262.

(*p*) Six Carpenters' case, 8 Rep. 147. 2 Inst. 107. and see Vaspor *v.* Edwards, 12 Mod. 661. Allen *v.* Bayley, 2 Lutw. 1596. Jennings *v.* Cousins, Hetl. 165. Aier *v.* Rushton, 3 Keble 190.

With respect to a distress of growing crops, under the stat. 11 G. 2. c. 19., I have before observed, that there is in that statute a particular provision with respect to a tender of the arrears of the rent, it being by the 9th section enacted, that if at any time before such crops are ripe and cut, cured or gathered, all such arrears, together with the costs of the distress shall be paid, then the distress shall cease, and the things distrained shall be re-delivered to the tenant.

It is however said, that in the case of a distress damage-feasant made by a bailiff or servant, it is not sufficient to tender the amends before impounding, to the person distraining, but that such tender should, if possible, be made to the owner of the land himself; unless indeed the distress be made by the bailiff of a manor, who may perhaps be considered as authorized not only to make such a distress but finally to dispose of it. (*q*) And Lord Chief Baron Gilbert seems to think that if a distress be made by a bailiff, the usual receiver of the lord, the lord being absent, tender to the bailiff is sufficient. (*r*)

It is obvious, that where the owner of the goods distrained makes a rescue of them, he must make it at his own peril, for if it afterwards appear that the distress was lawful, he will be liable to an action for an unlawful rescue; (*s*) and therefore, if there be any doubt respecting the legality of the distress, it is most prudent not to attempt a rescue of it, but to wait until the goods are impounded, and then replevy them, or bring an action of trespass for the taking, in either of which cases, the right of making the distress is the point to be tried: which if decided in favour of the owner of the goods distrained, will entitle him in the one case to a return of the distress and damages for the detainer, or in the other, to damage proportioned to the value of his goods distrained.

(*q*) Pilkington's case, 5 Rep. 76. Pilkington *v.* Hastings, Cro. Eliz. 813.

(*r*) Hunt's Gilb. 89.

(*s*) Vide post chap. xiv.

CHAP. XIII. In addition to the above named remedies of trespass and replevin, in the case of a wrongful distress for rent, that is to say, of a distress where no rent is due at the time of making the distress, or when there has been a tender of the amount due, (*t*) the party grieved may maintain trover, or a special action on the case; and it is immaterial whether the goods distrained have been sold by the distrainor, or redeemed by the party distrained on. (*u*) There is also in addition to these common law remedies the following statutory provision. By the stat. 2. Wm. and M. sess. 1. c. 5. s. 5. it is enacted, that in case any distress and sale shall be made by virtue or colour of that act for rent pretended to be in arrear and due, where in truth no rent is in arrear or due to the person distraining, or to him in whose name or right such distress shall be taken, that then the owner of such goods so distrained and sold, his executors or administrators, may by action of trespass or upon the case, to be brought against the person so distraining or his executors or administrators, recover double the value of the goods so distrained and sold, together with full costs of suit.

In an action on this statute, it seems to be sufficient for the declaration to allege, that the distress was made for rent, supposed to be due upon a certain demise before then made by the defendant to the plaintiff, without specifying the particulars of the demise itself; and to state generally that it was taken for and in the name of a distress, without adding for rent arrear. (*x*)

The stat. 11 Geo. 2. c. 19. s. 8., which empowers landlords to distrain growing crops for rent in arrear, gives them no power of sale until the crops are ripe and severed from the land. A sale therefore of crops so seized before severance is altogether void, and forms no ground of action against the landlord. (*y*)

(*t*) Branscomb *v.* Bridges, 1 B. & C. 145.

(*u*) Shipwick *v.* Blanchard, 6 T. R. 298.

(*x*) Salter *v.* Brunsden, 4 Mod. 231.

(*y*) Owen *v.* Legh, 3 B. & A. 470.

In the case of a wrongful distress of cattle damage-feasant, if the owner pay money for their release, he cannot recover it back in an action for money had and received; (z) nor can he it should seem maintain a special action on the case, where the original seizure is lawful, and there has been a tender of amends before impounding, for the injury done by the subsequent detention of the cattle. (a) An action of trespass or replevin, is the proper remedy in either of these cases; and it seems from the language of the court in Anscomb *v.* Shore, (a) that unlike the case of a wrongful distress for rent, (b) trover cannot in any case be maintained for a wrongful distress of cattle damage-feasant; but this point is very doubtful. (c)

The pound keeper is not answerable for receiving and impounding a distress, although the taking be altogether tortious, provided he do not exceed his office and assent to the trespass, and he is entitled to his customary fees notwithstanding the distress be wrongful: but if he do any act to identify himself with the wrong-doer, he is then liable as a trespasser to the party injured. (d)

There are various other cases of wrongful distresses provided for by the ancient statutes, especially by the statute of Marlebridge. Some of these, in consequence of the abolition of the military and villein tenures, have now become obsolete, but there are some provisions of the statute of Marlebridge and other statutes relative to distresses made on the highway, or out of the fee or jurisdiction of the lord, or for services not due, &c. which are still in force. To what cases these several provisions now apply, I have formerly considered, at present it will be proper to inquire into the remedies upon them.

The first of these provisions, is that contained in the 2nd and 15th chapters of the stat. of Marlebridge, by the for-

(z) Lindon *v.* Hooper, Cowp. 414.

(a) Anscomb *v.* Shore, 1 Camp. 285. S. C. 1 Taunt. 261. Bagshawe *v.* Goward, Cro. Jac. 147.

(b) Shipwick *v.* Blanchard, 6 T. R. 298.

(c) Bishop *v.* Mountague, Cro. Eliz. 824. Branscomb *v.* Hedges, 1 B. & C. 145.

(d) Bodkin *v.* Chancellor, Cowp. 476.

mer of which it is enacted, that " none shall distrain any to " come to his court, which is not of his fee or upon whom " he hath no jurisdiction, by reason of hundred or bailiwick, " nor shall take distresses out of the fee, or place where " he hath bailiwick or jurisdiction, and he that offendeth " against this statute shall be punished by fine, and that " according to the quantity and quality of the trespass." A part of the 15th chapter is to the same effect. Upon the 2nd chap. Lord Coke remarks that the clause which provides, that no man shall distrain any to come to his court but such as be within his fee, must be understood of suit-service in respect of a seigniory, and not of suit real in respect of resiance. And that the whole chapter is but a declaration of the common law, and therefore that if *A.* distrain *B.* and in a replevin *A.* avow as lord for rent or service, and *B.* pleads *hors de son fee,* and it is found for *B.*, *A.* shall not in this replevin be punished by ransom,&c. (that is by fine as at common law,) but that the party grieved must have an action upon this statute. (*u*)

This provision of the statute of Marlebridge was confirmed by the 16 chapter of the statute of Westminster primer, 3 Edw. 1. which enacts, that persons who take beasts wrongfully and distrain out of their fee, shall make heavy fine and be more grievously punished if the matter of the trespass do so require.

Upon which Lord Coke observes, that the stat. of Marlebridge, c. 4. speaks only of distresses, but this latter statute of all manner of takings, that the former statute prohibits such distresses generally, whereas the latter extends only to the taking of cattle. (*x*)

Upon the provisions of these statutes it therefore seems, that unless an action be brought upon a distress of cattle for the additional penalty inflicted by the statute of Westminster primer, it must be brought on the 2nd chapter of the statute of Marlebridge, which action is explained by Fitzherbert, to be founded on a special writ of trespass. For as Lord *Hale* observes, the party grieved shall not have advantage of the statutes of Marlebridge, except by a special writ

(*u*) 2 Inst. 24. (*x*) 2 Inst. 191.

founded on the statute, and not by a general writ of trespass, because in a special writ the party makes a fine to the king. (*y*) This writ recites the provision of the statute, and concludes with a precept to the sheriff, in the mean time to deliver the cattle distrained to the plaintiff; to which he is entitled upon this writ, as upon a replevin. (*z*)

Action on the statute of Marlebridge for a Distress taken in the highway.

The other provision of the statute of Marlebridge, to which I have referred, is that contained in the 15 chapter, which enacts, that "it shall be lawful for no man, for any "manner of cause, to take distresses out of his fee, nor in "the king's highway, nor in the common street, but only to "the king, or his officers having special authority to do the "same."

It has been already observed, that a distress taken in the highway is so completely unlawful, that it may be rescued by its owner; (*a*) but if he seek any further remedy for this offence he must bring an action on the statute of Marlebridge, for as Lord Coke observes, the plaintiff cannot avail himself of the statute by pleading it in bar to an avowry, for then the king would lose his fine. (*b*)

This action, like that for distraining out of the lord's fee, is founded on a special writ of trespass, upon which the plaintiff is immediately entitled to a return of his goods. (*c*)

Of a wrongful Distress in ancient Glebes, &c.

It may here be proper shortly to mention another statutory provision relative to the taking of distresses in the highway, or in ancient glebes, which relates only to ecclesiastical persons. It is contained in the ninth chapter of the *Articuli Cleri*, 9 Edw. 2, which, reciting that the king's officers, as sheriffs and others, do enter into the fees of the church to take distresses, and sometimes take the parson's beasts in the king's highway, where they have nothing but the land belonging to the church, declares that thenceforth such distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in timespast have been

(*y*) Note (*b*) F. N. B. 90.

(*z*) F. N. B. ut supra, Regist. Brev. 97. b.

(*a*) Ante p. 174, and Smith *v.* Shepherd, Cro. Eliz. 710.

(*b*) 2 Inst. 131.

(*c*) F. N. B. 90.

endowed; although distresses may be taken in possessions of the church newly purchased by ecclesiastical persons.

Upon which Lord Coke observes, that the statute of Marlebridge extends only to laymen, and this statute to men of the church, and that this appears by the register; for if a layman bring an action upon the statute for distraining in the king's highway, he counts upon the statute of Marlebridge, but a parson upon the statute of the *Articuli Cleri.* (*e*)

Lord Coke adds, that parsons are here named but for examples, for that the act extends to abbots, priors, and the like, but that it binds not the king distraining for any debt or duty due to him. (*e*)

With respect to a distress made on the glebe, as the statute is expressly confined to such glebes as were ancient at the time of passing the act, it must in this respect be nearly if not altogether obsolete.

The proceeding upon this statute appears to be either by attachment, or writ of prohibition, and it seems that the parson may have an attachment against the sheriff for making a distress in his glebe, without first having recourse to the writ. The writ itself enjoins the sheriff not to make any further distress on the parson, and also to deliver up to him the distress already taken. And if after suing out this writ, any further distress be made, the parson may sue out an *alias* or *pluries*, and afterwards have an attachment thereon. (*f*)

Action on the stat. of Marlebridge for a Distress for services not due.

Another species of wrongful distress, for which a remedy is given by the statute of Marlebridge, is that of a distress made for services which are not due, respecting which it enacts, that, "if any distrain his tenant for services and "customs being due unto him, or for any other thing for "which the lord of the fee hath cause to distrain: and after "it is found that the same services are not due, the lord "shall not therefore be punished by fine, if he suffer the

(*e*) 2 Instit. 627.

(*f*) F. N. B. 173, 174.

"distresses to be delivered according to the law and custom "of the realm, but shall be amerced as hitherto hath been "used, and the tenant recover his damages against him."

This branch of the statute, says Lord Coke, is interpreted that the lord shall pay no fine, and therefore since this act, no action of trespass *quare vi et armis* lies against the lord in this case, for then he should pay a fine. (*g*) But he adds, that this is to be intended where the lord himself distrains, for if his bailiff take a distress where nothing is behind, there an action of trespass *quare vi et armis* lieth against him, because the bailiff is not *dominus;* and so it is against a guardian in socage. But if the lord do a tortious act, not in respect of his seigniory, then an action of trespass lies against him. (*h*) And therefore upon the same principle, it should seem that in the three last cases the tenant may replevy the distress, and than plead the special matter in bar to the avowry.

Notwithstanding this statute, if the lord distrain for services where none are due, the tenant may make rescue of his goods, as in the case of distress for rent, where none is in arrear. (*i*) But it was formerly held, that if the lord by encroachment obtained a seisin of more than was due, the tenant could not rescue the distress, nor even avoid the encroachment in a replevin, unless it were against the lord's successor, or the issue in tail: but if the lord distrained for the rent or service really due and the encroachment also, (that is, as it should seem, not having seisin of the encroachment) it was held that the tenant might tender what was really due, and then make rescous, if the lord would not accept it, without being put to a writ of *ne injustè vexes*, or *contra formam feoffamenti*. So the encroachment might be avoided in an action brought by the lord for the rescous, or in trespass brought by the tenant for the distress of the sum encroached, and which was not justly due. But if the lord encroached by *coercion of distress* more than was due

(*g*) 2 Inst. 105.

(*h*) Ibid. and Combe's Case, 9 Rep. 76.

(*i*) Bevill's Case, 4 Rep. 11 b.

CHAP. XIII.

to him, the tenant was permitted, by pleading in replevin, to avoid a seisin so tortiously obtained. (*k*)

Action on the statute of Marlebridge for an unlawful Distress of beasts of the plough.

It has been already observed, that even at common law, beasts of the plough were not to be distrained for any cause, whilst other goods could be found for the distress. (*l*) This rule of the common law was however confirmed by the ancient statute *De Districtione Scaccarii*, 51 Hen. 3. stat. 4. by which it is provided, "that no man of religion, nor other, "shall be distrained by his beasts that gain his land, nor by "his sheep, for the king's debt nor the debt of any other "man, nor for any other cause, by the king's bailiff or other "person, but until they can find another distress or chattel "sufficient, whereof they may levy the debt, or that is suf-"ficient for the demand (except impounding of beasts that a "man findeth in his ground damage-feasant, after the use "and custom of the realm.") And this provision is enforced by the *Articuli super chartas*, 28 Ed. 1. st. 3. ch. 12.

For this wrongful distress of beasts of the plough, the tenant, if he please, may make rescue, (*m*) or may have his remedy by an action on the statute, for there is no action at the common law. (*n*) And this is by a special writ of trespass for the taking of the plaintiff's beasts against the form of the statute. (*o*) Therefore the writ should not be for a taking *vi et armis*, but *contra formam statuti et contra pacem*. (*p*) And neither the writ nor the count needs alledge that there was another reasonable distress to be found, for the negative of this must be shewn by the other side; and indeed the conclusion *contra formam statuti* implies it. (*q*) The fact of there being other sufficient distress must also be confined

(*k*) Bevill's case, 4 Rep. 11 b. and 2 Inst. 21. The proceedings alluded to in the text may be considered as obsolete, but the reasoning founded upon them is still applicable to some cases not falling within the provision of the 22d section of the stat. 11 Geo. 2. c. 19.

(*l*) Co. Litt. 47. b. and see the ancient writers cited by Lord Coke, 2 Inst. 132, 133.

(*m*) Co. Litt. 161, a.

(*n*) Porphrey *v.* Legingham, 2 Keble, 290.

(*o*) F. N. B. 90.

(*p*) 2 Inst. 133. Anon. Dyer 312. 2 Keble, 290. ut supra. Jemmott *v.* Cowley, 1 Sid. 344.

(*q*) Anonymous, Dyer, 312. Hale, note. F. N. B. 90.

to the very time of making the distress; for it is not material whether there were any such, either before or afterwards. (*r*) This writ, like that for taking a distress on the highway, or out of the fee, contains a clause for the delivery of the cattle to the plaintiff, to which he is entitled upon issuing the writ; (*s*) and if such a distress be made for rent in arrear, and afterwards the tenant in order to regain his beasts of the plough, tender or even pay to the lord the arrears, and thereby obtain a deliverance of them, although by such act he may seem to have affirmed the distress, yet he may have his action for the offence against the statute. (*t*)

The act itself extends to all kinds of distresses, either by the king or a subject; (*u*) but not to executions for the levy of a debt or duty, especially such as are imposed by subsequent statutes. (*x*)

Of the writ of recaption.

There is another species of wrongful distress, namely, that of taking a second time for a rent or service, the same cattle or other things before distrained for the same cause, the distress having been replevied, and the plea in replevin being still pending. For this injury, the owner of the things so taken may have his writ of recaption whether he be the tenant or a stranger. So if two men's cattle be at one time distrained for a rent or service, and afterwards the cattle of one of them be again taken for the same cause, he may have such writ. But if the cattle of two different persons be at separate times distrained for the same cause, the owner of the second distress cannot have this writ, because his cattle have not been twice taken. If such second distress be made by the lord himself or by his bailiff by his command, or if made by his bailiff without his command but the lord afterwards assent to it, the writ must be brought against the lord himself; but if made by his bailiff without his previous or subsequent concurrence, an action of trespass, and not a writ of recaption, lies against the bailiff. (*y*)

(*r*) 2 Inst. 133.

(*s*) F. N. B. 90. Regist. Brev. 97. b.

(*t*) 2 Inst. 133. Hale, note. F. N. B. 90.

(*u*) 2 Inst. 133.

(*x*) Hutchins *v.* Chambers, 1 Burr. 579.

(*y*) F. N. B. 71.

CHAP. XIII.

This writ seems to be almost co-extensive with the ancient writ of assize, *de multiplici districtione;* for it is the opinion of Fitzherbert that it lies even where different cattle of the same tenant are taken for the same cause as a former distress. (*z*)

"And this writ lies for the tenant before avowry made by "the lord in the first replevin, for otherwise the remedy "would not be adequate, because the lord might harass the "tenant by several distresses, before the lord by the rules of "the court could be compelled to avow. But then the te-"nant must in his declaration on the recaption aver, that the "second distress was taken for the same cause as the first, "otherwise the tenant fails in making out to the court his "title to the writ of recaption, and consequently cannot "punish the lord for taking the second distress." (*a*)

The recaption however in some cases lies upon a distress for rent accrued even after the first distress; for if the lord avow for rent, and the tenant plead *hors de son fee*, if the lord pending that plea, distrain for rent due at a subsequent day, the tenant may have a writ of recaption, because the lord's title shall be tried by the first plea; but if the tenant had pleaded *riens arrere* or levied by distress, then pending that plea the lord might have distrained for subsequent rent, because the seigniory was thereby confessed; and therefore the tenant could not have a recaption. (*b*)

This writ lies where the plea is depending in the county before the sheriff, as well as where it is depending before the justices of record; and whether it be removed into the court above by *pone* or *recordari*. (*c*)

(*z*) F. N. B. 72.

(*a*) Gilb. Distr. p. 233.

(*b*) F. N. B. 71. Therefore if landlord distrain and the tenant replevy, and in the replevin the tenancy be not denied, *qu.* whether he may not pending the replevin, again distrain the same goods for subsequent rent. And then after judgment for a return, go even against the sureties upon the replevin bond; for it is clear that goods returned to a plaintiff in replevin, may pending it be taken in execution at the suit of another creditor. Ante, 123, et vide Hefford *v.* Alger, 1 Taunt. 218.

(*c*) F. N. B. 72. where see the forms of the several writs.

So if a man be distrained, and he sue a replevin by plaint, and pending that plea is distrained again for the same cause, a writ of recaption may be directed to the sheriff, who shall hold plea thereupon. But if he be distrained within a liberty, and he sue a replevin there by plaint or writ, and be again distrained, (pending plea there) he shall not have a writ of recaption; because the plea is pending neither before the sheriff nor the justices; and the writ of recaption cannot be directed to any but the sheriff. (*d*)

In a recaption, the defendant must not avow as in a replevin, but justify the taking as in an action of trespass; because the damages to be recovered in recaption, are only for the contempt which the defendant has done against the law, and not for the taking or detaining of the cattle. And therefore, in a recaption it is not material whether the first distress be lawful or not. (*e*)

If the writ of replevin be abated, then the writ of recaption also abates. And if the plaintiff in the recaption be nonsuited, the defendant is entitled to a return of the distress. (*f*)

If the defendant in the recaption be convicted before the sheriff, he shall be amerced and pay damages to the party grieved for the contempt; if convicted before the justices, he shall pay such damages, but shall be amerced instead of being fined. (*d*)

Of an irregular distress.

I have already observed, that in general at the common law, if the distrainor committed an irregularity in conducting the distress, he thereby became a trespasser *ab initio*. This rule however seems to have extended only to positive and not to negative acts of irregularity. Because, as Lord Coke observes, "not doing is no trespass, and therefore if "the lessor distrains for his rent, and thereupon the lessee "tenders him the rent in arrear, &c. and requires his beasts "again, and he will not deliver them, this not doing cannot "make him a trespasser *ab initio*." (*g*) So if the act were

(*d*) F. N. B. 73.
(*e*) Id. 72.
(*f*) Id. 71. and Hale, note (*a*) ibid.
(*g*) Six Carpenters' Case, 8 Rep. 146 b.

positive, as that of unlawfully using a part of the goods distrained, even that rendered the distrainor a trespasser only as to that part of the goods so used. Thus where several barrels of beer were distrained for rent, and the distrainor drew beer out of one of them, Lord Holt held that it rendered him a trespasser *ab initio* only as to that single barrel. (*i*) However this rule of the common law, even with such limitations, occasioned great inconvenience and rendered a distress a very hazardous proceeding, especially in the case of rent, in which as the statute of 2 W. & M. sess. 1. c. 5. had authorized the things distrained to be sold in the manner therein directed, the proceedings under a distress for rent were rendered so much more complicated than they had formerly been at the common law, that they became more hazardous, and therefore in many cases, less beneficial than they had been before; to remedy which inconvenience it was by the stat. 11 Geo. 2. c. 19. s. 19, 20, 21. enacted, that where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party so distraining, or by his agent, the distress itself shall not be therefore deemed unlawful, nor the party making it be deemed a trespasser; but the person aggrieved by such unlawful act or irregularity, may recover full satisfaction for the special damage thereby sustained and no more, in an action of trespass or on the case, at the election of the plaintiff; provided, that where the plaintiff shall recover in such action, he shall be paid his full costs of suit, and have all the like remedies for the same as in other cases of costs. —— Provided also, that no tenant or lessee shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party distraining or his agent, before such action brought.

And by the succeeding section it is provided, that in any action of trespass or on the case brought against any person in respect of a distress or sale made by virtue of that act, or otherwise the defendant may plead the general issue, and

(*i*) Dod *v.* Monger, 6 Mod. 215.

give the special matter in evidence; and that if the plaintiff in such action shall become nonsuit or discontinue his action, the defendant shall recover double costs of suit; for which neither a certificate from the judge, nor a suggestion on the roll is necessary. (*a*)

To bring a case within the provisions of this statute the taking must be originally lawful, and consequently its operation is limited to acts subsequent to the distress; (*b*) and although, by the words of the statute, when any unlawful act or irregularity has been committed after the taking, the party grieved may recover satisfaction by an action of trespass, or on the case, at his election; it is held that the party must elect his form of action according to the nature of the injury committed, and not arbitrarily, and in opposition to the general rules of law. (*c*) He cannot therefore, where the taking is originally lawful, maintain trover, although as has been already stated he may do so where the taking is wrongful, (*d*) because such action assumes the defendant to have been a trespasser *ab initio*. (*e*) But if the party remains on the premises and commits some substantive act of trespass, as for example removes the goods, after the expiration of the five days, trespass is the proper form of action for such wrongful act, although it may be doubtful, if there be no irregularity beyond the mere remaining on the premises whether case is not the proper remedy. (*f*) If on the other hand he sells the goods without appraising them, (*g*) or takes an excessive distress, or detains in his hands the proceeds of the goods sold under the distress ultra the rent and costs; in all these cases a special action on the case is the proper proceeding, and it seems also in the latter case that he may waive the tort and

(*a*) Finlay *v.* Seaton, 1 Taunt. 210.

(*b*) 1 Esp. N. P. 182.

(*c*) Winterbourn *v.* Morgan, 11 East 395, 401.

(*d*) Shipwick *v.* Blanchard, 6 T. R. 298.

(*e*) Wallace *v.* King, 1 H. Bl. 13.

(*f*) Winterbourn *v.* Morgan, 11 East 395, 401.

(*g*) Messing *v.* Kemble, 2 Camp. 115.

bring assumpsit to recover back the surplus money withheld from him. (*h*)

Upon the 22d sect. of the statute which allows the defendant to plead the general issue, it has been determined, that a landlord cannot justify, "under the plea of the general "issue given by this act, except for acts done as landlord; "and therefore, although he may justify as far as the dis-"tress goes, he cannot justify expulsion under this issue: "so also if the goods continue on the premises beyond "the five days he cannot justify under this issue, enter-"ing the house to remove them afterwards; but must plead "a license to justify the *asportavit*, or *liberum tenementum* "to justify the expulsion." (*i*)

Irregularity in driving or Impounding a distress.

These provisions of the statute extend to all distresses for rent, but not to distresses for other causes, which are therefore still governed, with respect to an irregularity in their proceedings, by the rule of the ancient common law. So that trespass may be maintained upon any irregularity committed in such distresses, as for example an abuse of the thing distrained. (*k*) There is however one particular, as to which a statutory provision has been made, which extends to distresses in general. I mean, the driving and impounding of the distress, according to the direction of the statute of 1 & 2 Ph. & M. c. 12. by the first section of which it is enacted, that any person offending against that act, (that is by driving distresses out of the hundred, ex-

(*h*) Winterbourn *v.* Morgan, 11 East 395, 401. It has been decided in Graham *v.* Tate, 1 M. & S. 609., that where the tenant of premises, under a lease, and at a rent payable half yearly agreed to pay all taxes except the landlord's property tax, which the landlord agreed to allow, and the tenant agreed to lay out 20*l.* in repairs, which the landlord also agreed to allow, but afterwards distrained for a half a year's rent, and sold to the whole amount, without allowing either for repairs or property tax, which he knew the tenant had paid to the collector; the tenant might recover in respect of the property tax, but not in respect of the repairs, in an action for money had and received against the landlord.

(*i*) Hunt's Gilbert, p. 83.

(*k*) Bagshawe *v.* Seward, Cro. Jac. 147.

cept to a pound overt, within the same county, not above three miles distant from the place of taking the distress, or by impounding them in several places) shall forfeit to the party grieved for every such offence, an hundred shillings, and treble damages.

And the next section, enacting that no more than four-pence shall be taken for impounding any one distress, and when less has been used, then such smaller sum; imposes a fine of five pounds besides the excess of the sum taken beyond four-pence, to be paid by the offender to the party grieved.

Upon the former of these sections it has been determined, that the penalty shall be referred to the offence, and not to the persons committing it, and therefore that there can be only one penalty for one distress. So that if three persons be concerned in the driving of the distress, only one penalty of five pounds and treble damages shall be forfeited. (*l*) For the offence is in its nature single, and therefore is such whether committed by one or several persons. (*m*) It was indeed said in the same case, by Fenner, Justice, (*n*) that if the plaintiff had brought his action severally against each of the three persons driving the distress, each should have forfeited the penalty; and in another case, (*o*) Lord Holt is reported to have said that if a distrainor were to drive three beasts, belonging to different owners, each of them might recover from him a separate penalty; but both the latter opinions seem very questionable, and not easy to be reconciled with the principle established by the case first cited, that the penalty is single and entire like the distress.

The statute 2 Ph. & M. being a penal statute, is within the provisions of stat. 21 Jac. 1. c. 4., and the venue is consequently local; but where the action is for driving a distress out of the hundred into another county, the venue may be laid in either county. (*p*)

(*l*) Partridge *v.* Emson, Noy 62. Partridge *v.* Naylor, Cro. Eliz. 480.

(*m*) Rex *v.* Clarke, Cowp. 62.

(*n*) Noy 62. ut supra. Dyer, 177. in margine.

(*o*) Child *v.* Sands, 1 Salk. 32.

(*p*) Pope *v.* Davis, 2 Taunt. 252.

In a case on the statute of Philip and Mary, in which the plaintiff declared of a distress taken in an hundred in one county, and driven six miles out of the county, without averring that it was more than three miles from the hundred in which the taking was; even after verdict, the judgment seems to have been arrested, upon the ground of its not necessarily appearing to be an offence within the statute, because the hundred might have extended into both counties.(*q*)

This statute by inflicting a new and different penalty on an offence provided against by a former statute, namely the fourth chapter of the statute of Marlebridge, seems to be a virtual repeal of that part of the former act, and therefore, that the remedy to be pursued for it, must now be wholly founded on the latter statute. (*r*) For although in many cases, where a statute is only declaratory of the common law as to the description of the offence, the penalty imposed upon the offender by the statute is a cumulative remedy; yet where a statute creates an offence and inflicts a penalty, the remedy prescribed by it must be pursued: and in some cases it is so, even where the offence is not altogether created by the act. Thus, upon the second chapter of the statute of Marlebridge, Lord Coke observes, that excepting the penalty thereby imposed, it is but a declaration of the common law, and yet that the only remedy now to be pursued is an action upon this statute. (*s*) So it seems to be with respect to the offence of driving or impounding of a distress, contrary to the directions of the stat. 1 & 2 Ph. & M. c. 12. For in an action of tresspass brought for taking cattle, in which the defendant pleaded damage-feasant, and an impounding within three miles; and the plaintiff replied, that the impounding was in another county, the court held it a departure, because the declaration was founded upon the common law, and the replication upon a statute; observing, that it being a statutory offence, the plaintiff ought to have brought his action upon the statute. (*r*) And in a

(*q*) Anonym. Godbolt, 11. This however would now be helped by the statute of Jeofails.

(*r*) Woodcroft *v.* Thompson, 3 Lev. 48.

(*s*) 2 Inst. 104, 131.

later case, where, on a justification for impounding cattle damage-feasant, it appeared that the impounding was in another county, the court held, that it did not make the distrainor a trespasser *ab initio,* although it subjected him to the penalties of the statute; and therefore there was a verdict for the defendant.(*t*)

The right of the plaintiff to recover the costs of an action on this statute will be governed by the section on which the action is founded. The stat. of Gloucester, giving costs generally to plaintiffs, does not extend to actions on statutes giving double or treble damages, where single damages are not, independently of such statutes, recoverable; but it does extend to statutes giving to the party grieved a certain penalty. If, therefore, the action be grounded on the 1st section, the plaintiff is not entitled to costs, but he is entitled to them if his proceedings be on the second section; and the penalty given in the first section, in addition to the treble damages, does not alter the rule.(*u*)

Of an excessive distress.

Excessive distresses were always illegal at the common law, but it was found necessary at a very early period to confirm the sanctions of the common law in this respect, by statutory provision. And accordingly by the statute *De Districtione Scaccarii,* 51 Hen. 3. stat. 4. it was enacted, "that distresses should be reasonable after the value of the "debt or demand, and by the estimation of neighbours, and "not by strangers, and not outrageous." This was followed by the statute of Marlebridge, the fourth chapter of which provides, "That distresses shall be reasonable, and not too "great; and that he who taketh great and unreasonable "distresses, shall be grievously amerced, for the excess of "such distresses." Which provision was confirmed by the *Articuli super chartas* 28 Edw. 1. stat. 3. cap. 12.

The operation of the statute of Marlebridge is general; for although it has been said that it does not extend to all

(*t*) Gimbart *v.* Pelah, Strang. 1272.

(*u*) 2 Inst. 289. Anon. Dyer, 177 b. North *v.* Wingate, Cro. Car. 559. et vide Tidd. Prac. 8th edit. p. 980. and the cases there cited.

CHAP. XIII. kinds of distress; for that no distress for homage, fealty, or the expences of knights in parliament can be excessive, the better opinion seems clearly to be, that it applies to all cases of distress whatsoever. (*b*) And its effect has therefore been to supersede the ancient common law, both as to this offence, and its remedy. So that in general, the only remedy to be pursued, is an action founded on the statute. Therefore no indictment or information will lie for an excessive distress. (*c*) Nor can a general action of trespass be brought for it: (*d*) unless indeed the distress appear upon the face of the record to be so very excessive, that the distrainor must be considered as a trespasser for taking it. As in distraining six ounces of gold and a hundred ounces of silver, for the sum of six shillings and eight pence; for here the excess was not only palpable, but specific. (*e*) So if an excessive distress be abused, that is a separate cause of action; (*f*) or if to such a distress, be added any other distinct trespass, as that of turning the plaintiff out of his house, for such additional act, an action of trespass will lie. (*g*)

The distress however, for the taking of which, an action even on the statute of Marlebridge may be brought, must be one obviously excessive. As if a man distrain two or three oxen for twelve pence, or if he distrain a horse or an ox for a small sum, where a sheep or a pig may be taken, this is an excessive distress: because he might have taken a beast of less value. But if there be no other distress on the land, then the taking of one entire thing, however great may be its value, is not unreasonable. (*h*) And therefore it has been said, that even for a small demand, a cart and horses may be distrained, because they are not severable from each other. (*i*)

(*b*) 2 Inst. 107.

(*c*) Rex *v.* Ledgingham, 1 Vent. 104. S. C. 1 Lev. 290.

(*d*) Woodcroft *v.* Thompson, 3 Lev. 48. Lynne *v.* Moody, Fitzgibb. 85. S. C. 2 Stra. 851. Hutchins *v.* Chambers, 1 Burr. 590.

(*e*) More *v.* Munday, cited 1 Burr. 590., and Crowther *v.* Ramsbottom, 7 T. R. 658.

(*f*) Lynne *v.* Moody, 2 Stra. 851.

(*g*) Etherton *v.* Popplewell, 1 East. Rep. 139.

(*h*) Gilb. Distr. 63. Field *v.* Mitchell, 6 Esp. 71.

(*i*) Clarke *v.* Tucket, 2 Ventr. 183. 1 Roll. Abr. 674. March. 91. pl. 149.

In an action on this statue, it is necessary to shew upon the face of the record, that the distress is excessive, for otherwise it does not sufficiently appear to the court, to be a case within the act; (*k*) but it is not necessary to prove express malice in the party distraining.

Lastly, "There can be no remedy upon the statute of "Marlebridge, where there is a remedy at the common law, "nor if the plaintiff has recovered in replevin, can he af-"terwards bring an action on that statute; for an action on "that statute is founded on there being a cause of distress, "of which the recovery in replevin shews there was none; "moreover in replevin, damages were recoverable for the "taking, and a man shall not be permitted to say, there "was a cause of distress after he has recovered upon the "ground of its being unlawful." (*l*)

(*k*) Rex *v.* Ledgingham, 1 Mod. 288. Clarke *v.* Tucket, 2 Vent. 183.

(*l*) Hunt's Gilbert, p. 68.

CHAPTER XIV.

Of Rescous and Pound-Breach, and of the several Remedies for the same.

The unlawful rescue of a distress, or the breaking of a pound was always an offence at common law, and the remedy for it was a special action of trespass; but a further remedy has been given in some cases, by the provision of a modern statute. It is not however every rescue of a thing distrained which is deemed unlawful; for, as I have already observed, there are various occasions on which the owner of the goods is entitled to make rescue of them, if wrongfully taken. And indeed it may be considered as a general rule, that wherever a distress is wrongful in its inception, it may be rescued.

CHAP. XIV. In some cases also, rescue may be made of a distress that has only become wrongful by matter subsequent; this however depends upon certain distinctions which it will be necessary to consider.

A rescue may be made of any distress which is absolutely tortious, as if made for rent, whether it be a rent charge or rent service, where none is in arrear. (*a*) But it was held at the common law, that if the lord had once gained a seisin of rent, the tenant could not rescue a distress made for it, upon the ground of his never having held by such rent; although where the tenant held by one rent, and the lord by encroachment gained seisin of a further rent, it was held that the tenant might tender what was really due, and rescue the distress made for the rent by encroachment; (*b*) and therefore in general it was considered, that if any part of the rent distrained were in arrear, or if the tenant held by other services than those distrained for, he could not make rescue. (*c*) But as a distress is only a means of compelling the payment of the rent, if at any time before the distress, the tenant tender all the arrears, and the landlord afterwards distrain, the tenant may rescue it: (*d*) and as it should seem, may even rescue a distress *before it is impounded*, if unlawfully *detained* after tender of the arrears of rent, and the charges of the distress itself. (*e*)

A rescue may also be made of a distress for an unlawful amerciament, (*f*) or if the subject or place of the distress be improper, as if beasts of the plough be taken, when another sufficient distress may, at the same time, be had, or if any thing be distrained, which is not distrainable at common law, or by statute, or if the distress be taken in the highway. (*g*)

The rescue must however be made by the tenant or owner of the goods, and not by a stranger, for he can have no right

(*a*) Co. Litt 160. 161.

(*b*) Bevil's Case, 4 Rep. 11 b.

(*c*) Bro. Abr. Rescous, pl. 14. 18.

(*d*) Co. Litt. 160, 161.

(*e*) Six Carpenters' Case, 8 Rep. 146. Bevil's Case, 4 Rep. 11 b. Firth *v.* Purvis, 5 T. R. 433.

(*f*) Com. Dig. Distr. D. 5 Bro. Abr. Rescous, pl. 12.

(*g*) Co. Litt. 161 a.

to dispute the distress. (*h*) And, therefore, if in one distress the goods of two persons be wrongfully taken, it seems to be the better opinion, that each can make rescue only of his own goods, for indeed he is a stranger to the remainder of the distress. (*i*) And therefore in such a rescue, severance must, if possible, be made. (*k*) Where a rescue however is lawful, it may be made, not only by the tenant or owner of the goods himself, but by an agent: and therefore may be made by his guardian, or even by a servant, who may afterwards justify under his command. (*l*)

A distress made out of the lord's fee is unlawful, and therefore, if the lord distrain out of his fee, in lands not holden of him, the tenant may make rescue, unless it be in some special cases.

As if the lord come to distrain cattle which he sees within his fee, and the tenant, or any other person, in order to prevent the lord from distraining them, drive the cattle out of the fee, yet the lord may immediately follow and distrain them; and the tenant cannot make rescue, although they be taken out of the lord's fee. But if the lord coming to distrain, had no view of the cattle within his fee, although the tenant drive them off purposely, or if, after the view, the cattle of their own accord go out of the fee, or the tenant remove them, for any other cause than to prevent the distress, and the lord afterwards distrain them out of his fee, the tenant may make rescue. So if a man come to distrain for damage-feasant, and see the beasts in his soil, and the owner chase them out, though expressly for the purpose of preventing the distress, he cannot distrain them, and if he do, the owner of the cattle may rescue them, for the beasts must be damage-feasant at the time of making the distress. (*m*)

It is a general rule that no rescue can be made of a distress after the goods are impounded, for then they are in the custody of the law. If, however, the cattle of a commoner

(*h*) 1 Roll. Abr. 673.

(*i*) F. N. B. 102. et notis.

(*k*) Jennyngs *v.* Playstowe, Cro. Jac. 568.

(*l*) Bro. Abr. Rescous, pl. 7. 12.

(*m*) Co. Litt. 161.

CHAP. XIV. be wrongfully taken as damage-feasant, and impounded, and he make fresh pursuit after them, and find them in an open pound unlocked, it is said that he may retake them. (*n*)

There may be an unlawful rescous in law, as well as in deed, as if a man has taken a distress, and the cattle distrained, as he is driving them to the pound, go into the stable or close of the owner, if he that took the distress demand them of the owner, and he do not deliver them, this is a rescous in law. (*o*) But there is no rescous unless the distrainor have possession of the goods; as if a man come to distrain, and he be prevented from so doing, he shall not have a writ of rescous, but an action on the case. (*p*) For although such disturbance may amount to a disseisin of the rent or service, it is not a rescous until the thing be distrained. (*q*) And if the distrainor quit possession of the distress, the retaking of the goods is not a rescue of them. (*r*)

Both rescous and pound-breach were, as I have before observed, offences at the ancient common law; and although the statute 2 W. & M. c. 5. has provided a further remedy for them in the case of a distress for rent, yet even in that particular kind of distress, it has not superseded the remedies given by the ancient common law. It will therefore be proper to consider, in the first place, these common law remedies; and afterwards inquire into the effect of the statute of William & Mary.

The remedy at common law for an unlawful rescue, is a special action of trespass for taking and detaining the goods being distrained, and about to be impounded, in which may be included a count for an assault on the distrainor, or his bailiff. (*s*) And if there be a rescue of several distresses for different rents, the whole may be included in one writ of rescous. (*t*)

As the person in whose right the distress is made, is the

(*n*) Co. Litt. 47 b. et not. ibid.
(*o*) Co. Litt. 161 a.
(*p*) F. N. B. 102.
(*q*) Co. Litt. 160.
(*r*) Dod *v.* Monger, 6 Mod. 216.
(*s*) F. N. B. 101.
(*t*) Hale, note, ibid. Bro. Rescous, pl. 1.

party damnified by the rescue, he only can have this writ, and therefore if there be a rescue of a distress which is taken by the lord's bailiff, the lord himself shall have the writ, and not the bailiff, and therein he may include, not only the assault and battery of his servant, but also the loss of his service: (*w*) as even a rescue and pound-breach may be included in one writ. (*x*) But if the king, by his bailiff, make a distress for rent, and it be rescued, the bailiff shall have the writ and not the king. (*x*)

The writ of rescous may state generally the distress and the rescue, without even specifying the place where the rescue was made; but this must be shewn in the count, which must also set forth the times when the rent or services accrued, for which the distress was made. (*y*) And it has been held, that even if the distress be made out of the fee of the lord, upon fresh pursuit, the common form of the writ is sufficient. (*z*) And if the count shew when the rent was in arrear, it is not requisite to alledge a seisin of it. (*a*) Nor is it always necessary to be laid *vi et armis*, for it may be a rescous, though done without force. (*b*)

To this action the defendant may plead the general issue, of not guilty, or he may plead special matter in bar. (*c*) And it should seem, that upon rescue of a distress for rent in arrear, *riens in arrere*, is a good plea; (*d*) since it is clear, that upon a distress for rent not due, the tenant may make rescue, without being driven to his replevin. And so is a plea of *non tenuit*, for in this action the tenure is traversable; but, if denied the negative must be specially pleaded, for it cannot be shewn under the general issue of not guilty. (*e*) A plea of *ne unques seisie*, is not however good; (*f*) as the seisin of the rent, cannot be tried in this action. (*g*) Nor

(*w*) Alwayes *v.* Broome, 2 Lutw. 1263.

(*x*) F. N. B. 101. 102.

(*y*) Hale, note F. N. B. 101. Theol. Dig. lib. 10. cap. 9.

(*z*) Bro. Abr. Rescous, pl. 3.

(*a*) Bro. ibid. pl. 7.

(*b*) Bro. ibid. pl. 2.

(*c*) Bro. Abr. Rescous, pl. 28.

(*d*) Ibid. pl. 6. S. V. Ibid. pl. 10, 16. and Estoppel, pl. 162.

(*e*) Bull. Ni. Pri. 62.

(*f*) Bro. Rescous, pl. 10.

(*g*) Bro. Abr. ibid. Bevil's Case, 4 Rep. 11.

CHAP. XIV. can the defendant plead, that he held by other services; for if he hold of the lord at all, he cannot make rescue. (*h*) It seems rather doubtful, whether to this action, the general plea of *hors de son fee* be good; and it is therefore better to plead that the *locus in quo* was *hors de son fee*, and held of another lord; to which the plaintiff may reply, that the distress was made for a rent-charge, or that the cattle were taken on fresh pursuit. (*i*) So that, it is not sufficient for the defendant to traverse the place of the taking laid in the count, but he must go on, and shew it to be either his own or a stranger's freehold, in which the distress ought not to have been made. (*k*)

The defence must be such as to cover the whole rescue; and therefore, where rescous was brought for rescuing forty sheep of the defendant, and eighty belonging to *J. S.* and the defendant justified the putting of his forty sheep into the *locus in quo*, to use his right of common therein: and that the plaintiff *de injuriâ &c.* took and chased them; and that he the defendant would have taken them from him, and they ran among the other eighty sheep of *J. S.* and flocked with them; and because he could not sever them, he took and chased them, *Quæ est eadem, &c.* Upon demurrer to the plea, it was without argument, adjudged to be bad. For the defendant could not rescue the sheep of *J. S.* and although it appears that they flocked together, and he could not sever them, yet he ought to have pleaded that he chased them to a certain place in order to sever them, and not that he chased them all away: (*l*) or, according to Dodderidge, Justice, he might have justified putting them all back on the common, until they were severed; (*m*) or have shewn, that he afterwards severed them, and returned the sheep of *J. S.* to the plaintiff. (*n*) For if the defendant by his plea will justify the rescous, he must shew distinctly that it was lawfully made.

(*h*) Bro. Abr. Rescous, pl. 18.

(*i*) Bro. ibid. pl. 3, 19, 22. Id. Issues joines, pl. 26.

(*k*) Bro. Abr. Rescous, pl. 9, 11.

(*l*) Jennyngs *v.* Playstowe, Cro. Jac. 568.

(*m*) S. C. 2 Roll. Rep. 163.

(*n*) S. C. Palmer, 123.

And therefore, in another case, where the plaintiff declared for rescuing four hogs, and for breaking the pound, and taking out of it a fifth hog, all being distrained damage-feasant; and the defendant pleaded not guilty to the pound-breach; and as to the rescous, that whilst all the hogs were in the plaintiff's possession, he tendered amends, but without traversing that any one of the hogs was then impounded, the court held it bad; for although he had pleaded not guilty to the pound-breach, yet it might be, that he had retaken the fifth hog out of an open unlocked pound, and consequently without being guilty of the pound-breach; although the tender of amends, as to the rest, would be too late; and his stating them all to be in the plaintiff's possession when the tender was made, was too argumentative, without distinctly denying that any one of them was before impounded. (*o*)

It is observed by a late learned writer, (*q*) "that this action is now rarely brought, but a special action on the case, in which non-tenure may be given in evidence on the general issue;" but by this must be understood, only the case of rescous of a distress for rent; upon which an action lies on the statute of 2 W. & M. c. 5; for every other rescous remains as it was at the common law, and consequently must be pursued by an action of trespass, although, as I have before observed, it needs not necessarily be laid *vi et armis*.

Pound-Breach at Common Law.

Pound-breach was at the common law a greater offence than an unlawful rescue, being considered as a trespass to the king and a breach of the peace, for which even hue and cry might be raised against the offender: (*r*) and as it is commonly said, might be inquired of in the sheriff's tourn, as an offence committed in direct contempt of the authority of the law. (*s*)

It has been already observed, that if the cattle of a commoner be wrongfully taken as damage-feasant, and he upon

(*o*) Alwayes *v.* Broome, 2 Lutw. 1262.

(*q*) Bull. Ni. Pri. 62.

(*r*) Mirror, c. 2. s. 26.

(*s*) 2 Hawk. P. C. 67.

CHAP. XIV. fresh pursuit find them in a pound not locked or fastened, he may lawfully retake them. (*t*) But in general, as soon as the distress is impounded in any lawful pound, it is so much in the custody of the law, that it cannot be retaken without the party's being guilty of a pound-breach. (*u*) One exception however to this rule is mentioned; for it is said, that if there be lord, mesne and tenant, and the tenant be distrained by the lord for services alledged to be due from the mesne, the mesne (to relieve the tenant) may take the tenant's cattle out of the pound, and put his own in their stead. (*x*)

The remedy at common law for this injury to the distrainor, is by a special action of trespass founded on the writ *de Parco-fracto*: besides which, the distrainor may retake the goods, and again impound them. (*y*) In this writ, the breaking of the pound is said to be done *vi et armis*, but it is not necessary to shew in the writ, what kind of cattle or goods were distrained nor whose property they are. (*z*) This rule however seems to be confined to a distress for rent or service; for if it be made for an amerciament, the cause of the distress should appear in the writ, as well as that the goods were the property of the person amerced; because for an amerciament, the goods of a stranger cannot be taken. (*s*) And if the distress be made by the bailiff of the plaintiff, it seems to have been usual so to state it in the writ. (*z*)

But it is not necessary, either for the writ or the count, to make a title to the distress, because the unlawfulness of the distress is no excuse for a pound-breach. (*a*)

The writ *de parco-fracto* lies at the suit of the distrainor, but not at the suit of his bailiff who made the distress, nor at the suit of the owner of the land in which the pound may be; for it is not his pound for the time being, but the

(*t*) Co. Litt. 47 b.

(*u*) F. N. B. 100. S. V. Alwayes *v.* Broome, 2 Lutw. 1262.

(*x*) Co. Litt. 100 a. Tresham's Case, Rep. 110 b.

(*y*) Bro. Avowry, pl. 13. Co. Litt. 47 b.

(*z*) F. N. B. 100. Regist. Brev. 116.

(*a*) Anonymous, 1 And. 31. Coltsworth *v.* Bettison, 1 Salk. 347.

pound of him who distrains. (*d*) And if the husband distrain for rent or services in right of his wife, and a stranger take the distress out of the pound, the husband shall have the writ in his own name, although it is said that the wife may be joined. (*e*)

It seems that a writ *de parco-fracto* will not lie against the owner of the pound. And therefore, where to an action for breaking the pound, and taking out the beasts, the defendant pleaded not guilty, as to the taking; and as to the pound-breach, said he was lord of the soil on which the pound stood, aud that he broke the lock, and put on another lock of his own: it was said by Hobart, Justice, that this was no pound-breach, unless the beasts came out; and by Jones, Justice, that if the beasts did come out, *a parco-fracto* would not lie, because the freehold was in the defendant, and that the proper remedy was a special action on the case. (*f*)

Of a Rescue or Pound-Breach on the stat. of Wm. & Mary.

In the case of a rescue, or pound-breach on a distress for rent, a further remedy than that given by the common law has been provided by the statute 2 W. & M. c. 5. by the fourth section of which it is enacted, "that upon any "pound-breach or rescous of goods or chattels distrained "for rent, the person or persons grieved thereby, shall in "a special action upon the case, for the wrong thereby sus-"tained, recover his and their treble damages and costs "of suit, against the offender or offenders, in any such "rescous or pound-breach, any or either of them, or "against the owners of the goods distrained, in case the "same be afterwards found to have come to his use or "possession."

In an action on this statute, it is necessary to make a title to the distress, by setting forth the demise upon which the rent accrued, and shewing that the rent was due. (*g*) And in general to shew, that the distress is warranted by

(*d*) F. N. B. 100.

(*e*) Ibid. but Fitzherbert adds Tamen quære.

(*f*) Holman *v.* Tuke, Winch's Rep. 80.

(*g*) Dod *v.* Monger, 6 Mod. 215. Bellasis *v.* Burbidge, 1 Lutw. 214.

CHAP. XIV. the act: (*k*) but it is not necessary to alledge or prove that the notice required previously to the sale of the distress was given, because such notice cannot be required as against wrong doers. (*k*)

The venue should be laid where the rescous is committed, for that is the gist of the action, and the rest but inducement: and therefore, where the demise rent and distress were stated to be in three vills, but the venue laid in that only where the rescous was committed, the court held it to be good. (*k*)

If a distress be impounded on a part of the premises demised, according to the directions of the stat. 11 Geo. 2. c. 19. s. 8, 9, 10., any retaking of the goods is a pound-breach within the stat. 2 W. & M. c. 5. although it might not have amounted to a pound-breach at the common law. (*l*) And tender of amends after impounding, is no plea to an action on the latter statute. (*l*)

In this action the plaintiff is entitled not only to treble damages, but treble costs may also be recovered. (*m*)

(*k*) Bellasis *v.* Burbidge, 1 Lutw. 214. S. C. Ld. Raym. 170.

(*l*) Firth *v.* Purvis, 5 T. R. 432.

(*m*) Lawson *v.* Story, Carth. 321. S. C. Ld. Raym. 19.

INDEX.

A.

Page

ACTION,
- of trover for a wrongful distress . . 176
- on statute of Marlebridge and Westminster 1st. for a distress out of the lord's fee . 177, 178
- on statute of Marlebridge for a distress taken in the highway 179
- on ditto for distress for services not due . 180
- on statute 1 & 2 Ph. & M. for unlawfully driving or impounding a distress . . 188, *et seq.*
- on statute of Marlebridge for an excessive distress 191, 193
- at common law for an unlawful rescue . 193
- for a pound-breach . . 199
- on statute of Wm. & Mary for the same . 201
- on statute 8 Anne, c. 14. for rent . . 82

ADMINISTRATORS.—See EXECUTORS.

AFFEERMENT,
- who may be affeerors . . . 122
- formerly was in all cases necessary . . 123
- but now unnecessary where the amerciament is in a sum certain 124

ALIENATION,
- in fee, effect of under the statute Quia emptores terrarum 15

Page

AMBASSADORS,
goods of, and of the servants of, exempted from distress 75
AMENDS.—See TENDER.
AMERCIAMENTS.—See FINES.
ANCIENT-DEMESNE,
tenants in, how far exempt from toll . . 133
ANNUITY,
writ of 31
annuity act 36
difference between a rent and an annuity . 68
grantor of, occupying lands charged, may be distrained upon . . . 77
APPORTIONMENT,
of rent, origin of the doctrine of . . 24
difference of, in reservation, or grant of rents . . . 27
must be by a jury when . . 27
of a rent-service by the common law . . 26
by the statute of Quia emptores terrarum . . . ib.
by act of law . . ib.
by act of the party . . 27
by eviction of part of the land . ib.
of a rent-charge, by act of law . . 33
of a coparcenary rent . . . 38
of a rent in dower . . . 47
APPRAISEMENT,
of goods distrained under the stat. of Wm. & Mary 156
time of making it . . . ib.
by whom to be made . . 156, 157
oath to be taken by the appraisers and memorandum thereof . . 157
form of the appraisement . . . ib.
And see title CONDUCTING OF A DISTRESS.
ASSIGNEE,
of a rent-charge, may distrain for it . . 36
of a bankrupt, may distrain for rent . . 61
ASSIZE,
rents of 22, 23
what seisin required to support an assize for rent . 21

Page

ATTORNMENT,
how created 21
when formerly necessary . . 21, 35, 52
when now necessary . . . 21, 35, 77
not necessary to the lord's title by escheat . 30
nor to a devisee by custom 59
AVOWRY,
general avowry for services and reliefs . 114

B.

BAILIFF,
of a corporation, distress by . . 64
of a landlord, distress by . . . 150
distress by, for an amerciament . . 171
tender of amends to . . . 175
BANKRUPT,
assignees of, distress by . . . 61
goods of, how far liable to be distrained . 85
BARNS,
of distraining things secured in . . 95
BARON AND FEME. See HUSBAND AND WIFE.
BODY-POLITIC. See CORPORATIONS.
BY-LAWS,
may give the remedy of distress for the recovery of a penalty 125
but not authorize its sale . . . *ib.*
only the offender's goods are distrainable . *ib.*
are binding without notice to those subject to them *ib.*
must be lawful, reasonable and not injurious to the public 126

C.

CARRIERS,
goods in the hands of, are not distrainable . 145
CERTUM LETŒ,
cannot be distrained for . . . 119
unless there be an amerciament . . *ib.*

Page

CESTUY QUE TRUST,
heriot not due on the death of . . 105
CESTUY QUE VIE,
distress for rent on the death of, under the statute of Hen. 8. . . . . 50, 53
CESTUY QUE USE,
of a rent-charge, may distrain for it . 32
CHIEF RENTS 22
CIVIL LAW,
difference between the distresses and the pignus or hypotheca of the civil law . . 2
COGNIZANCE. See Avowry.
COMMITTEE,
of the king's ward, distress on . . 109
of a lunatic, distress by . . . 62
COMMON, TENANTS IN
have several estates . . . 41
how they should join or sever in actions or distresses . . . . ib.
one may distrain for his share, on a tenant paying the whole to the other, contrary to notice . 42
may lease to, and distrain upon, each other . . ib.
how they shall do fealty . 101
suit 110
distress by, for damage-feasant . . 138
COMMONERS,
distress by, for damage-feasant . 136, 137
on the cattle of . . 136, 138
COMMONS,
distress of tenant's beasts feeding on . . 96
CONDUCTING OF A DISTRESS,
For Rent.
by whom to be made . . 149, 150
form of making . . . 150
warrant of distress . . . ib.
inventory . . . 151
notice of distress for a rent-service . 152, 153
for a rent-charge . 152
of growing crops . 152, 162
appraisement and sale of the distress under the stat. of Wm. & Mary . 153, 156, 158

Page

CONDUCTING OF A DISTRESS—*continued.*
for rent
removal of the goods distrained, when necessary 154
proceedings where the goods are already taken in execution . . . 159
on a fraudulent removal . 160, 161
on a distress of growing crops . 162
of impounding the distress. See title POUND.
distrainor cannot in any case use the thing distrained . . . 167
except cattle taken *in Withernam* . 168
distress cannot be detained, if tender of rent and expences be made before impounding . 169
of a distress not made for rent.
in general, no distress at common law, except for a fine or amerciament, can be sold 169, 171
unless there be a custom to warrant such sale 169
or it be necessary for the public benefit, or be made under some statutory provision . 170
of impounding such distresses. See title POUND.

CONSTABLE,
duty of, under stat. 11 Geo. 2. c. 19. . 96

CONUSEE,
of a fine, levied of his own rent to his own use, may afterwards distrain . 32
otherwise as to coparceners . 38
of statute staple or merchant, may distrain . 50
but not for an arrear previously incurred *ib.*
effect of his entry on execution *ib*

COPARCENERS,
before partition, are only one heir . . 37
or one tenant . . 104
how they shall do fealty . . . 101
suit . . 108, 110
not prejudiced by each other's acts . . 38
may distrain for rent reserved on partition . 21, 37
should distrain jointly before partition, but severally afterwards . . . 37
may by partition sever the distress from the rent 38

Page

COPARCENERS—*continued.*
cannot distrain on each other before partition 39, 75
distress on, by the lord . . . *ib.*
COPYHOLD,
tenures preserved by stat. 12 Car. 2. c. 24. . 99
fealty incident to . . . 101
rents 23
are not within the stat. 32 H. 8. c. 37. . 52
this point questioned . . 65
are distrainable as rent-service . *ib.*
in the hands of the copyholder or his lessee . . *ib.*
of corporal copyhold services . . 111
CORN,
liable to execution and distress . . 84
in what place distrainable . . 95
cases distrainable at common law . 147
proceedings on a distress of . . 162
CORPORATIONS,
sole, distress by . . . 63, 64
effect of leases granted by . . 64
aggregate, acts by . . . *ib.*
distress for rent by . . *ib.*
are within the stat. 4 Geo. 2. c. 28. s. 5. . *ib.*
COSTS,
how far recoverable in an action on the stat. 1 & 2 Ph. & M. c. 12 . . . 191
COUNTY,
of driving a distress out of the . . 164
COURTS,
of the court-baron 107
customary court . . . 110
court-leet . . . 107, 118
and see LEET.
CURTESY, TENANT BY THE,
may be of land or a rent . . . 46
distress by, in what cases . . *ib.*
is not within the stat. 32 H. 8. c. 37. . 52
for what he shall do suit . . . 110

Page

CUSTOMS,
may be distrained for . . . 114
general requisites of a good custom . . 115
how construed . . . 116
how considered as between the lord and his tenants *ib.*
custom may support a distress against common right *ib.*
or warrant its sale . . 169
for impounding a distress 171

D.

DAMAGE-FEASANT,
one of the causes of a distress . . 13
distress for, is grounded on a custom of the realm 135
such distress may be made by the owner of the soil, or a commoner, &c. . . 136, 137
in what cases the commoner may distrain the cattle of the lord . . . 136
in what cases he may distrain the cattle of other commoners or strangers . . 136, 138
distress for, by tenants in common . . 138
right of distress will pass to a grantee of the vesture of the soil . . . *ib.*
for what damage such distress may be made 139, 141
on what things it may be made . 140, 143
in what cases the cattle of a stranger may be distrained . . . 140, 141
at what time and in what place, such distress should be made 141
the thing distrained must not be used, injured, or destroyed . . . 142

DEBT
for rent at common law by executors . . 54
for reliefs by executors of the lord . . 114

DEMAND
of rent, how far necessary to support a distress 87

DEMESNE,
tenant in, within the stat. 32 H. 8. c. 37. . 52

Page

DEVISEES,
may distrain in respect of their reversion at common law 59
or without a reversion on a freehold rent . 60
entitled to an apportionment of rent . *ib.*
of a rent-charge *per autre vie* may distrain . . *ib.*

DISTRESS,
definition of 1
antiquity of, the remedy of . . *ib.*
law of, whence derived . . 1, 2
formerly only a pledge . . . 8
ancient abuses of the right of . 4, 5, 7
enumeration of the causes of a . . 11, 12
must be reasonable . . . 191
for rent, .
improvement of the remedy of . . 8
incident to rent-service . . 14
but not to a rent-seck . . 15
how far to a rent-charge . . 14
follows the seigniory services and reversion 30
must ensue the nature of the estate . 32
is inseparable from the fealty . . 39
extended to rents-seck, chief-rents, and rents-assize . . 11, 23
joint distress should not be made for several rents . . 69, 95
second distress not allowed, pending plea to try the lord's seigniory . . 31
may be made on one land, where the rent is charged on another . 31, 94
may be made as soon as the rent is payable . 69
cannot be made without demise . 70
of making several distresses for the same rent at common law . . . 70, 92
ditto, under stat. 17 Car. 2. c. 7. 70
is not to be used by the distrainor . 167, 168

WRONGFUL DISTRESS,
different kinds of . . 173, 174
party wrongfully distrained upon may make rescue . . . 174, 175

Page

WRONGFUL DISTRESS—*continued.*
or bring trover, or trespass, or replevin . 176, 177
cannot maintain special action on the case for . 177
nor money had and received for money paid by reason of . . . 177
remedy given by the stat. of Wm. and Mary, for a wrongful distress for rent . . 176
by stat. of Marlebridge and Westminster, 1st, for a distress made out of the lord's fee . 178
by stat. of Marlebridge, for a distress made in the highway . 179
by stat. of Articuli Cleri, for wrongful distress in the fees of the church, &c. . 179, 180
by stat. of Marlebridge, for a distress for services not due . 180
by ditto, for an unlawful distress of beasts of the plough . . 182
by writ of recaption, for twice taking the same cattle for the same cause . . . 183

IRREGULAR DISTRESS,
rule of the common law as to it . . 185
altered by 11 Geo. 2. c. 19. . . 186
irregularity in impounding a distress . . 187
remedy for the same . . *ib.*

EXCESSIVE DISTRESS,
was illegal at the common law . . 191
also forbidden by several ancient statutes . *ib.*
remedy for the same by the stat. of Marlebridge . *ib.*
to what cases it extends . . 192
excess of the distress must appear on the record *ib.*
no action can be had on this statute if there be other remedy . . . 193
As to the persons who may distrain, see titles COPARCENERS, EXECUTORS, &c.
As to those who may be distrained on, and what goods may be distrained, see GOODS OF WHOM, AND OF WHAT KIND DISTRAINABLE.

Page

EXCESSIVE DISTRESS—*continued.*
As to the time and place of a distress, see titles TIME and PLACE.
As to making and disposing of a distress, see title CONDUCTING OF A DISTRESS, and title POUND.
DISTRINGAS
to compel appearance, &c. . . 126
DOUBLE RENT,
distress for, under stat. 11 Geo. 2. c. 19. . 71, 72
DOWER, TENANT IN,
may be of land, or rent, or a reversion . 46
may distrain, of common right, for a rent in dower 47
unless the thing be uncertain in its nature . 47, 48
holds, as in dower, land assigned in respect of, or in exchange for dower . . 48
and may distrain accordingly . . *ib.*
is not within the stat. 32 Hen. 8. c. 37. . 52
not to be distrained for suit . . 109
of a tenancy, shall pay a third of the rent . 29
DUTIES
imposed by act of parliament, distress for . 13

E.

ECCLESIASTICAL
corporations, distresses by . . 64
persons, how far exempt from toll . . 133
ELEGIT, TENANT BY,
may distrain 49
may have the benefit of an apportionment of rent 50
is not within the stat. 32 Hen. 8. c. 37. . *ib.*
ESCAPE
of cattle, before distress made . . 94, 195
ESCHEAT,
for what there shall be an escheat . . 30
reversion may escheat . . . *ib.*
and a distress be made in respect of it . *ib.*

Page

ESCHEAT—*continued.*
is a title paramount . . . 30
gives a right of distress without attornment . . *ib.*
lord claiming by, is not within the stat. 32 Hen. 8. c. 37. 52

ESTOPPEL,
on leases made by corporations not conformably to the statutes . . . 64
on leases made by a mortgagor . . 67

EVICTION
by the lord, suspends or extinguishes a rent . 25
where a partial eviction creates an apportionment 27

EXECUTION
under a statute, effect of . . . 51
goods taken in, when distrainable 84, 148, 149
proceedings, where goods are taken in . 159

EXECUTORS AND ADMINISTRATORS,
of tenant in fee, in tail, or for life, were without remedy at common law for the arrears accrued in their testator's lifetime . . 50
distress for them given by stat. 32 Hen. 8. c. 37. which extends to the executors of tenants *per autre vie* . . . *ib.*
for what arrears on a lease for years they may distrain 55, 56
should distrain before assent to a specific bequest 56
of their unity of possession in land and rent . 60
assent to a bequest of land or rent . 61
right to waive a lease . . 77, n. (*s*)
distress on 77
ditto, under stat. 8 Anne, c. 14. . 91

EXTINGUISHMENT
of rent, origin of the doctrine of . . 25
rent-service, by tortious acts of the lord . *ib.*
where effected by a unity of possession 26
of rent-charge, by purchase of parcel of the land 27, 33
by the act of God . . 35
of heriot-service . . . 106
by bond or judgment . . . 29, 30

F.

FAIRS. See MARKETS.
FEALTY,
to what tenures it is incident . . 100
from whom it is due . . . 101
inseparable from the reversion . . 20, 101
distress inseparable from the fealty . . *ib.*
FEE,
distress out of the lord's fee forbidden 6, 93, 178
except for a rent-charge . . 93
of the church, distress in . . . 179
FEE-FARMS,
nature of 22
of the crown 63
distress by the grantees, &c. . *ib.*
FEME COVERT. See HUSBAND and WIFE.
FERÆ NATURÆ,
animals not distrainable . . . 143
unless reclaimed and kept for profit . *ib.*
FINE. See CONUSEE.
FINES AND AMERCIAMENTS,
one of the subjects of a distress . . 12
fines may be imposed for contempt or disobedience of a court 117
how recoverable . . . *ib.*
in what cases they may be imposed by a court-leet . . . 118
difference between fines and amerciaments . *ib.*
on whom, and for what offences, a fine may be imposed 119
fine for non-feazance, not distrainable of common right . . . . *ib.*
must be reasonable . . . . *ib.*
not to be jointly imposed . . . 120
fines for refusal of duty at the court-leet 120, 121
amerciaments, by whom and for what offences to be made . . . 120, 122
when they may be distrained for . 121
require a presentment to support them . 122

Page

FINES AND AMERCIAMENTS—*continued.*
amerciaments, in what cases they require to be affeered 122
in what not . . 123
may be joint for a joint offence, but must be severally affeered . 124
where a distress for them may be made . . . *ib.*
only the offender's goods can be distrained . . 125
there should be several amerciaments and distresses for different offences by the same person . *ib.*
bailiff distraining for, should have a special warrant 171
distress for fines and amerciaments in a court-leet may be sold, but not those in a court-baron 172
within what time to be sold . *ib. et* note (*g*)
such distress should be impounded according to the directions of the statute of Philip and Mary 172

FRANKALMOIGNE,
tenant in, could not be distrained upon . 17
tenure of preserved by stat. 12 Car. 2. c. 24. . 100

FRAUDULENT REMOVAL,
distress of goods fraudulently removed under stat. 8 Anne, and 11 Geo. 2. . 91, 96, 160, 161
what is a fraudulent removal within those statutes 97
can be of tenant's goods only . . 98

FREE-BENCH,
distress by, tenant by . . . 48
suit of court, due from tenant by . . 110

FREEHOLD,
things belonging to, not distrainable . 148

FRESH PURSUIT,
of cattle, by their distrainor . . 94
by the owner of a distress . . *ib.*

FURNISHED LODGINGS,
distress for rent of . . 17, 71

G.

Page

GAVELKIND
rent, descendible according to the nature of the estate 19

GLEBE,
distress cannot be made on ancient glebes 179, 180
remedy for such distress . . 180

GOODS OF WHAT KIND ARE DISTRAINABLE,
distress cannot be made on goods in which there can be no valuable property . . 142
as animals *feræ naturæ* . . 143
unless reclaimed and kept inclosed for profit . . . *ib.*
all personal chattels distrainable damage-feasant *ib.*
how far things in present use are distrainable . *ib.*
or things in the way of trade . . 144
or implements of trade or husbandry . 146
or beasts of the plough, &c. . . *ib.*
or things of a perishable nature . . 147
or corn, straw, or hay . . *ib.*
or things affixed to the freehold . . 148
or growing crops . . . *ib.*
in the custody of the law not distrainable . 80—148
as if taken in execution, &c. unless such execution be satisfied . . 80
determinations on stat. 8 Anne, c. 14. respecting the landlord's claim to rent out of goods taken in execution . . 80—84
goods in execution at the suit of the king, not within the statute . . 81

GOODS OF WHOM DISTRAINABLE,
by the king . . . 62
or his grantee . . . 63
generally, the goods of all persons are distrainable for rent . . . 73
distrainable for a rent-charge granted by joint-tenants . . . 75, 76
by other persons . . 77, 145

Page

GOODS OF WHOM DISTRAINABLE—*continued.*
distress on several tenants for an entire rent . 77
of persons holding under an implied tenancy . *ib.*
of a lessee disseizor by tortious ent ry . 78
of the disseizor of a lessee . . . *ib.*
of a stranger when distrainable . . 79, 145
of a bankrupt . . . 85
GRAND AND PETIT CAPE—See DISTRINGAS.
GRANTEE
of a rent-charge.—See title RENT-CHARGE.
of the king, distress by at common law . 62
distress on . , . 74
does not owe suit . . 109
of a fee-farm of the crown, distress by . . 63
GUARDIAN
in socage, distress by . . . 61
testamentary, ditto . . . *ib.*
rescue of distress by a . . . 195

H.

HAY,
distrainable under stat. W. & M. . 147, 162
HEIRS,
entitled to arrears, accrued after their ancestors' death . . 56, 59
to distrain according to the nature of the estate descending. . . 56, 58
upon what reservations they will be entitled to a rent . . . 57, 58
in tail, entitled to a rent reserved generally by tenant in tail . . . 58
so the customary heir, or *ex parte maternâ* . 59
entitled to a rent, if named in the clause of distress 58
and to all the incidents of a rent . 59
HERIOTS
preserved by stat. 12 Car. 2. c. 24 . . 99
origin and nature of . . . 101, 102

Page

HERIOTS—*continued.*
different kinds of 102
heriot-custom, nature of . . *ib.*
not distrainable 102, and note (*r*) *ib.*
may be seised . . *ib.*
custom for a commutation of 104, 116
heriot-service due only on reservation . 102, 104
how it may be reserved . . 104
formerly not seisable . . 103
how seisable at this time . . *ib.*
when considered as a rent . *ib.*
on whose death it is due . 104, 105
when on a determination of the tenancy . . . 105
is incident to the reversion . *ib.*
multiplication of . . 106
extinguishment of . . *ib.*
on whose goods and where a distress for it may be made . *ib.*
a joint distress for several heriots is bad . . . *ib.*
in what cases the distress for it may be sold . . . 107

HIGHWAY,
distress in, unlawful except by the king . 93
on what cases it may be made by a subject . 94
distress made in, may be rescued . . 174
or action brought for it . . 179

HOMAGE,
tenure by, abolished by stat. 12 Car. 2. c. 24. . 99

HORS DE SON FEE,
pending plea of, distress could not be made . 31
plea of to a writ of rescous . . 198

HOUSES,
distress on goods fraudulently concealed in 96, 161

HUNDRED,
of driving a distress out of the . . 164
constable of the, within the stat. of W. & M. . 156

HUSBAND AND WIFE,
where they should join or sever in actions . 42
in what distresses they may join . . 43

Page

HUSBAND AND WIFE—*continued.*
wife can never distrain alone . . 43
the husband may in all cases . . . *ib.*
distinctions as to distress for arrears of rent, as accruing before or after coverture, or on a freehold or chattel interest . . . 44
chattels real of the wife reducible into possession by the husband . . . *ib.*
effect of such reduction as to distress . . *ib*
distress at common law, for rent on a freehold interest of the wife . . . 45
under statute of Hen. 8. . . *ib.*
on joint leases by husband and wife not conformable to the statutes . 46
feme covert shall do fealty . . . 101
may be a freehold tenant . . 108
but not sit on the homage . . *ib.*
heriot not due on the death of . 104

I.

IMPLEMENTS,
of trade or husbandry when distrainable . 146
INN,
goods in, not distrainable for rent . . 144
to what cases this rule extends . *ib.*
INVENTORY,
of goods distrained . . . 151

J.

JOINT-TENANTS,
are seised per my et per tout . . 39
cannot prejudice each other's rights . . 40
how far they may grant a rent-charge . . 41
or rent-service . *ib*
how they shall do fealty . . . 101
suit . . . 108, 109

JOINT-TENANTS—*continued.* *Page*
one may distrain alone, but must avow jointly with his companions . . . 39
survivor of, may distrain for all arrears . . *ib.*
may sever the joint-tenancy . . . 41
distress on 75
IRREGULAR DISTRESS.—See DISTRESS.
JUSTICES,
proceedings before them under statute 11 Geo. 2. c. 19. in cases of fraudulent removal . 97, 161

K.

KING,
distress for rent by . . . 62
might be made without attornment . *ib.*
or on all lands of his lessee . . *ib.*
or of an under tenant for a previous arrear 63
on the possession of . . . 73
or of his grantee . . . 74
goods in execution at the suit of, are not within the statute 8 Anne, c. 14. . . . 81
distress by, in the highway . . . 93
is exempt from toll . . . 133
cannot owe suit 109
may distrain for an amerciament in a court-baron . 121
may reserve rent out of an incorporeal hereditament 16
cannot discharge from suit to the leet . . 120
may discharge from toll . . . 133

L.

LANDLORDS,
or lessors for years, &c. distress by . . 67
entitled to rent out of goods taken in execution . 81—84
LEASE,
of tithes 16
vesture of the land . . . *ib.*
may be made to each other by tenants in common 42

Page

LEASE—*continued.*
by husband and wife 46
by tenants in tail 48
for years not within the statute 32 Hen. 8. c. 37. . 54
by corporations 64
by parol from year to year so long as both parties shall please 70
after the determination of the rent, could not be distrained for at common law . . 89
this altered by statute 8 Anne, c. 14. . 90
continued by tenant's holding over . . 89

LEET,
origin of the court leet . . . 12
suit at the . . . 120
from whom due . . . *ib.*
due in respect of resiancy . . 121
not within the statute of Marlebridge . *ib.*

LEGATEES.—See Devisees.
their interest in a bequest subject to the executor's assent 56, 61

LEVANT AND COUCHANT,
cattle of a stranger distrainable for a rent-charge after being levant and couchant . 74, 146
for a rent-service . . . 74

LEVARI FACIAS,
one of the modes of recovering fines . . 117
for a debt recovered in the lord's court . 127, 128

LIFE, TENANT FOR,
distress by 49
consequence of the death of, before the rent became due at the common law . . *ib.*
altered by stat. of Geo. 2. . . *ib.*
distress by executors and administrators of, under the stat. 32 Hen. 8. c. 37. . . 52

LIME KILN,
not distrainable . . . 148

LORDS,
abuses of the power of distress by the ancient lords 4, 5, 7
distress by, for a rent-service . . 30
made in respect of the seigniory . 31
when by title of escheat . . 31

Page

LORDS—*continued.*
of a manor, distress by . . . 65
distress on the cattle of, damage-feasant 136, 137
LUNATICS,
distress by committees of . . 62

M.

MANOR,
courts incident to, the court-baron . . 107
the customary court . 109
distress by the lord of a . . . 65
MARKET,
how far tolls are incident to . . 129
distress for tolls due in . . . 134
things brought into it not distrainable damage-feasant 141
how far distrainable for rent . 144
MILL,
suit to the 110
MONEY,
when distrainable . . . 147
MORTGAGE,
effect of 65
mortgagor and mortgagee's estate, after execution of 66, and note (*z*)
distress by mortgagee, on a lease made before the mortgage 66
ditto after the mortgage . . . *ib.*
distress by the mortgagor, on a lease made after the mortgage . . . . *ib.*
MULTIPLICATION
of heriot-service . . 106

N.

Page

NOMINE PŒNÆ,
descends to an heir, as incident to the rent . 59
demand of, when necessary . . 88
NOTICE
required, to entitle the landlord to double rent . 71, 72
of distress and sale . . 151, 153
of distress of growing crops . . 163
to the sheriff in possession under an execution to retain the landlord's rent . . 159
of securing a distress of corn, &c. under the stat. of Wm. and Mary . . . 162
of impounding, required, if the distress be put in a private pound but not if put into a public one 167

O.

OFFICE.—See King.

P.

PARCENERS.—See Coparceners.
PARSON,
distress on the cattle of, in the highway, or in ancient glebes . . . 179, 180
PARTITION.—See Coparceners.
PENALTY,
distress for, under acts of parliament . 13, 125
PIGNUS.—See Civil Law.
PLACE OF A DISTRESS,
not to be made in the highway, or out of the lord's fee 93
for rent, not to be on other lands than those on which the rent is charged, or out of which it issues 94, 95

Page

PLACE OF A DISTRESS—*continued.*
in what cases it may be made in a house or other inclosed place . . . 95
under statute 8 Anne, and 11 Geo. 2. in case of fraudulent removal . . 96, 97, 160, 161
of tenant's cattle feeding on commons appurtenant to the premises demised . . 96

PLOUGH,
beasts of, not distrainable, if other sufficient distress 6, 146
remedy for an unlawful distress of . . 182

PORTS AND PORT DUTIES,
port duties one of the causes of a distress . 13
tolls and duties incident to every port . . 132
nature of port duty . . . 131
in what cases a consideration for it must be shewn 132

POUND,
definition of 165
overt what 166
covert what . . . . *ib.*
use of, whence derived . . . 2
of impounding a distress at common law . 163, 170
altered by the statute of Marlebridge 163, 164, 170
further altered by the statute of Ph. & Mary 8, 164, 170
by custom 171
in what cases a distress may be driven out of the county 164, 165
of impounding a distress on the premises under the statute of 11 Geo. 2. c. 19. . . 165
household goods, and other things liable to injury, to be put into a pound covert . . 166
cattle into a pound overt . . . *ib.*
in what cases the distrainor is answerable for the things distrained . . . *ib.*
distrainor not to use the distress when impounded 167
although done for its benefit . . *ib.*
but the owner of the distress may use it . *ib.*
distress not to be impounded after a sufficient tender 168
remedy by action on statute of Philip & Mary for unlawfully impounding a distress . . 188 et seq.

Page

POUND-BREACH.—See RESCOUS.
POUND-KEEPER,
not answerable for wrongful distress, &c. when, . 177
PREROGATIVE.—See KING.
PRESENTMENT,
necessary to support an amerciament . . 122
by whom to be made . . *ib.*
PRIVITY,
of estate, destroyed by a grant of a rent in fee . 32
ditto in rent-charge . . 35
PROCESS.—See DISTRINGAS.

R.

RECAPTION, WRIT OF,
by whom it lies 183
against whom to be brought . . . *ib.*
lies on proceedings in the courts above, as well as in the sheriff's court . . . 184
how defendant must plead . . . 185
judgment thereon . . . . *ib.*
RECEIVERS,
appointed by the Court of Chancery, distress by, . 62
RELIEFS,
on socage tenure preserved by statute 12 Car. 2. . 99
of the different kinds of the socage-relief . 111, 112
to what incident and when payable . 111—113
difference between the relief and the heriot . 113
what relief payable by joint-heirs . . *ib.*
remedy for, by the lord or his executors or administrators 114
not within the stat. 32 Hen. 8. c. 2. . *ib.*
but expressly included in stat. 11 Geo. 2. c. 19. *ib.*
REMOVAL,
of goods distrained, when necessary . . 154
distress on a fraudulent removal of goods 91, 96, 97, 160, 161

Page

RENT,
origin of 14
general requisites of . . . 24
nature of a rent-service . . . 14
distress of common right incident to rent-service *ib.*
incident to the reversion and services . . 20
effect of its being separated from them . 20, 29
difference between a rent and an annuity . 68
issues out of the realty . . . 17, 71
whether rent can issue out of a mere chattel . 68
out of what it may be reserved . . 15
not out of an incorporeal hereditament . 16
except by the king . . *ib.*
whether reservable on tithes . . *ib.*
may be reserved on lease of the vesture of the land . . . *ib.*
or on a demise of furnished rooms 17
but not of a mere personal chattel *ib.*
must be certain, or capable of being reduced to a certainty . . . . *ib.*
must be reserved by a deed or conveyance, passing or enlarging an estate . . *ib.*
could not be reserved, at common law, on a bargain and sale, but may now by the operation of the statute of uses . . . 18
what reservation will create a rent . . 69
will pass by a mere grant of the reversion . 18
or by a devise of it . . 59
if reserved generally is payable yearly . 17, n. (*a*)
when it goes to the heir or the executor . 55
should be reserved conformably to the estate . 19
how far the law will cure an improper reservation of 19, 57, 58
issues wholly out of part of the land, where the remainder is recovered by a title paramount 34
when considered to be due . . . 89
how affected by the death of a person having a determinable estate on which a lease depends 49
what kinds of rent are within the statute 32 H. 8. c. 37. 52

Page

RENTS—*continued.*
devisable, although suspended by unity of possession 59
distress for double . . . 71
demand of, how far requisite . . 87
in arrear not extinguished by taking bond . 29
extinguished by judgment . . 30

RENT-SECK,
nature of 15
difference between a rent-seck and an annuity 68
what is a rent-seck within the statute 4 Geo. 2. c. 20. . . . 67, 69
created by separating a rent-service from the reversion or services . . . 15, 20
or by reserving the distress for a less period than the rent 32
distress not incident to . . . 15

RENT-CHARGE,
nature of a 14
effect of, when granted by a joint tenant 40, 76
ditto, as to those claiming by a later title . 76
does not escheat to the lord of the land charged 30
how far suspended or extinguished by the possession of the king . . . 74
by prescription out of a manor . . 76
distress, how far incident to . . 14, 31
remedy for by writ of annuity or distress . 31
where rent deemed to be a rent-charge without a clause of distress . . . 21
not within the 22nd section of stat. 11 Geo. 2. c. 19. 22
nor an ancient one, within stat. 4 Anne, c. 16. *ib.*
not apportionable like a rent-service . . 33
but apportionable by act of law . . *ib.*
pro concilio impendendo . . . 35
extinguished by purchase of part of the land . 33
where extinguished by the grantee's claiming the land under the grantor . . *ib.* 34
extinguished by the act of God . . 35
suspension of . . . 34

Page

RENT-CHARGE—*continued.*
is assignable, but not its arrears . . 36
is within the annuity act, in what cases . 36, 37
distress for arrears of, by executor of tenant *per autre vie* 53
per autre vie, devisable within the stat. of Wills 60
distress by grantee of, on the possession of the king or his grantee . . 74
not within the restriction of distraining within the lord's fee 93

RENTS OF ASSIZE,
nature of . . . 22, 23
out of copyhold lands, whether within the stat. 4 G. 2. c. 28. s. 5. . . . 65

RESCOUS AND POUND-BREACH,
rescue of a wrongful distress . 174, 194
when it might be on a distress for rent gained by encroachment . . . 181, 194
may be made on a distress for rent not due . 194
for an unlawful amerciament . 195
of a distress made in the highway . *ib.*
or if things not distrainable be taken . . . *ib.*
when it may be made on a distress taken out of the lord's fee . . . *ib.*
when after tender . . . 194
when after impounding . . 195
by whom to be made . . 194
rescous, what amounts to a . . 196
rescous and pound-breach offences at common law . . . . *ib.*
further provided against by stat. Wm. & M. *ib.*
this extends only to cases of rent . 199
rescous, writ of at common law . . 197
and count thereon . . *ib.*
writ of rescous, what might be pleaded thereto 197, 198
pound-breach,
nature of the offence of, at the common law . 199
of the writ *de parco fracto* . . 200
by and against whom it lies . 201

Page

RESCOUS AND POUND-BREACH—*continued.*
of the action for rescue or pound-breach on stat. Wm. & M. . . . 201
of the declaration, venue, and costs therein . 202
REVERSION,
distress incident to, of common right . 20
how far rent incident to and separable from . *ib.*
inseparable from the fealty and service . . *ib.*
necessity of, to support a distress for rent since the stat. 4 Geo. 2. c. 28. . . 68

S.

SALE
of goods distrained under stat. of W. & M. 153, 159
by custom . . 169
SEIGNIORY,
suspension of . . . 29
distress in respect of . . . 31
plea to try the . . . *ib.*
SEISIN,
of a rent, when necessary to create privity . 21
tortiously gained by coercion 6, 21, 181
by encroachment . 182
how far to be disputed in replevin . 22
what seisin required under the stat. 32 H. 8. c. 2. . . 22, 35
ditto, under stat. 11 Geo. 2. c. 19. . *ib.*
of services and reliefs . . 114
SERVICES,
nature and different kinds of . . 98
of coporal copyhold services . . 111
seisin of 114
one of the most ancient causes of a distress . 3, 98
distress always incident to them . . 20
inseparable from the reversion . . *ib.*
remedy for a distress made for services not due . 181
not distrainable, if other sufficient distress . 6, 146

Page

SHEEP
remedy for unlawful distress of . . 182
SOCAGE,
military tenures converted into, by stat. 12 Car. 2. c. 24. 99
tenure, nature, and different kinds of . 100
of the socage relief . . 111, 112
STAMPS,
not required for proceedings under a distress . 150
STATUTES,
Magna Charta, cap. 10. . . . 5
14. . . 122
of Merton . . . 107, 121
De Districtione Scaccarii . 5, 146, 182, 191
Marlebridge, cap. 2. . 134, 177, 179, 190
3. . . . 6, 180
4. . 6, 94, 134, 164, 171, 191
9. . 108, 109, 120
15. . . 177, 179, 180
Westminster primer,
cap. 16. . . 5, 178
Westminster the second,
cap. 36 & 37. . . 7
Quia Emptores Terrarum, 28 Edw. 1st. 15, 22, 26, 99
Articuli Super Chartas, 28 Edw. 1. . 182, 191
Articuli Cleri, 9 Edw. 2. . . 179
17 Edw. 2. c. 6. . . . 99
1 Edw. 3. c. 12. . . . 99
34 Edw. 3. c. 15. . . . *ib.*
21 Hen. 8. cap. 5. . . 46, note (*x*)
32 Hen. 8. c. 1. . . . 41, 59
2. 114
28. . . . 48
37. . . 44, 50, 52, 60, 65
1 & 2 Philip and Mary, cap. 12. 8, 104, 170, 171, 188, 189, 190
21 Jac. 1. c. 4. . . . 189
12 Car. 2. c. 24. . 12, 61, 99, 111
17 Car. 2. c. 7. 92
22 Car. 2. c. 6. 63

Page

STATUTES—*continued.*
2 W. & M. c. 5. s. 2. . . 147, 153, 154
3. . . 95, 147, 162
4. . . 196, 201
4 Anne, c. 16. . . . 21, 77
8 Anne, c. 14. s. 1. . . 80, 159
2. . 91, 96, 160
6, 7. . . 71, 90
4 Geo. 2. c. 28. s. 5. 22, 23, 46, 49, 56, n. (*u*) 60, 65, 68, 72, n. (*y*)
s. 6. . . . 78
11 Geo. 2. c. 19. s. 1. . . 91, 96, 160
2. . . 97, 162
7. . . 97, 162
8. . . 148, 162
9. . . 168, 175
10. . 155, 165, 170
15. . . 49
18. . . . 71
19. . . 167, 186
20. . . 186
21. . . *ib.*
22. . . 22, 114
56 Geo. 3. c. 50. . . 84
6 Geo. 4. c. 16. . . . 85

STATUTE, STAPLE, OR MERCHANT.—See CONUSEE.

STRANGER,
goods of, in what cases distrainable . . 145

SUIT,
of court, preserved by stat. 12 Car. 2. c. 24. . 99
different kinds of . . . 107
distrainable . . . . *ib.*
to the court baron, from whom due . . *ib.*
how performed . . *ib.*
by persons having joint estates under stat. Marlebridge . 108
extinguishment of . . . 109
not due from the king, or his grantees . *ib.*
to the customary court, from whom due, and how to be performed . . . 110
to the mill, from whom, and to whom due . 111

Page

SUIT—*continued.*
to the mill, remedies for . . . 111
at the court-leet, from whom and how due . 120
SUSPENSION
of rent, origin of the doctrine of . . 25
of rent-service, effected by purchase of the land, &c. 26
by eviction . . 28
where it can be partially effected by act of the party . . 28, 34
when by act of law . . *ib.*
of a rent in joint-tenancy . . 40
of a rent-charge by the possession of the king . 74
by act of the party . . 35
of a seigniory 29

T.

TAIL,
distress by 48
by ditto after possibility of issue extinct . *ib.*
reservation of rent by tenants in, goes with the estate 19, 58
issue in, are within the stat. 32 H. 8. c. 37. . 53
TENANTS,
unlawful distresses on, by the ancient lords . 4, 7
how far liable to two distresses . . 20
distress on several for an entire rent . 77
not liable to be distrained for the rent of a preceding tenant . . . 78
effect of their holding over at common law . 89
under stat. 8 Anne . 90
how far the act of, could prejudice the mesne lord 21
privity between lord and tenant by attornment . *ib.*
under tenants,
distress on the goods of . . 78
TENDER
of rent, when and where it should be made . 89

Page

TENDER—*continued.*
of rent, effect of before or after distress . . 89, 175
must be made before impounding . 168
when distress is made on growing crops 163, 168
to whom to be made . . 175
of amends for damage-feasant . . 174
TENURE,
nature of the ancient tenures . 3, 12
ancient military tenures abolished . . 12
TIME
of a distress for rent at common law, with respect to the determination of the term . 89
ditto under the stat. 8 Anne, c. 14. . 90
of distress for rent with respect to a demand of the rent . . . 87
on goods fraudulently removed . 91
TITHES,
whether rent could formerly be reserved on a lease of 16
may be distrained damage-feasant when . 139
TOLLS,
one of the causes of a distress . . 13
to what incident . . 129, 132
must be claimed by grant or prescription . 129
must be reasonable . . . *ib.*
on what and from whom due . . 130
toll traverse, what it is, and how claimed . 130
toll through, what it is . . . *ib.*
what consideration is required to support it . . . 131
are incident to every public port . . 132
how due in respect of it . . 133
what persons are exempt from them . . *ib.*
discharge from by the king . . . *ib.*
to what toll distress is incident . . 134
distress for, may be had on the highway . *ib.*
or on goods in a market . . *ib.*
on what and on whose goods it may be made . . . *ib*
TOURN.—See LEET.
TRADE,
things belonging to, are distrainable for toll . *ib.*

Page

TRADE—*continued.*
things belonging to, how far distrainable for rent . 144
TRESPASS.—See ACTIONS.
TROVER,
lies for goods taken under an illegal distress . 176
TRUSTEES,
of a feme-covert may distrain . . 61

U.

UNDER-TENANT.—See TENANT.

V.

VENUE,
in an action on the statute 1 & 2 Ph. & Mary, c. 12. 189
VIE, TENANT PER AUTRE,
distress by executors of . . . 51, 54

W.

WARRANT OF DISTRESS,
for rent . . . 150
for fines or amerciaments 171
WEARING APPAREL,
in what cases distrainable . . . 143, 144
WIFE.—See HUSBAND AND WIFE.
WITHERNAM,
cattle distrained in, may be used . . 168
WRITS
writ of annuity on a rent-charge . . 31
de exoneratione sectæ . . . 109

Page

WRITS—*continued.*

special writ of trespass on the 2d chap. of the stat. of Marlebridge 178
15th chapter . 179
stat. of Articuli Cleri *ib.*
stat. of Marlebridge for an unlawful distress of beasts of the plough . 182
of recaption . . . 183, *et seq.*
of rescous 197
of *parco fracto* . . . 199, 200

FINIS.

J. AND T. CLARKE, PRINTERS, ST. JOHN-SQUARE.

LAW BOOKS

PUBLISHED BY

JOSEPH BUTTERWORTH AND SON,

43, FLEET STREET, LONDON.

The Magistrate's Manual; or, a Summary of the Duties and Powers of a Justice of the Peace; carefully compiled from the best Authorities, with Extracts from adjudged cases, and the Statutes of the 7th and 8th Geo. IV. 1827: including a copious Collection of Precedents of Summonses, Warrants, Convictions, &c. By W. TOONE, Attorney at Law, late Clerk to the Magistrates acting for the Division of New Brentford, Middlesex. The Fourth Edition, with considerable Additions, price 21*s.* boards.

A Treatise on the Law of Legacies. By the late R. S. DONNISON ROPER, Esq. Barrister at Law, of Gray's Inn. The Third Edition, under an entirely new Arrangement, and with very considerable Additions, by HENRY HOPLEY WHITE, Esq. Barrister at Law, of the Middle Temple. In 2 vols. royal 8vo. price 2*l.* 18*s.* boards.

The Laws relating to the Poor, including the Collections originally made by E. BOTT, Esq. and afterwards edited by F. CONST, Esq. Sixth Edition; in which the Statutes and Cases to Hilary Term, 1827, are arranged under their respective heads, and the whole System of the Poor Laws is placed in a clear and perspicuous point of view. By JOHN TIDD PRATT, of the Inner Temple, Esq. Barrister at Law. In Two Vols. octavo, price 2*l.* 8*s.* boards.

Summary of the Duties of a Justice of the Peace out of Sessions; with some Preliminary Observations. By HENRY JAMES PYE, Esq. The Fourth Edition with considerable Additions, including the late Statutes passed for Improving the Administration of Criminal Justice in England. Price 9*s.* boards.

A Treatise of the Law concerning the Liabilities and Rights of Common Carriers, in two Parts. By GEORGE FREDERICK JONES, of Lincoln's Inn, Esq. Barrister at Law. Price 8*s.* boards.

A *Treatise* on the *Law* of *Fixtures* and other *Property* partaking both of a Real and Personal Nature; comprising the Law relative to Annexations to the Freehold in general, and also Emblements, Charters, Heir Looms &c.; with an Appendix, containing Practical Rules and Directions respecting the Removal, Purchase, Valuation, &c. of Fixtures, between Landlord and Tenant, and Outgoing and Incoming Tenants. By A. AMOS and J. FERARD, Esqrs. Barristers at Law. In royal octavo, price 18*s.* boards.

A Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. By HENRY ROSCOE, of the Inner Temple, Esq. Barrister at Law, price 15*s.* boards.

The Law of Executors and Administrators. By Sir SAMUEL TOLLER, Knight, late Advocate-General at Madras. The Sixth Edition, corrected, with considerable Additions. By FRANCIS WHITMARSH, of Gray's Inn, Esq. Barrister at Law. In octavo, price 15*s.* boards.

1C

of a
with
IV.
Far-
the
The

ia,
dy
ar
s

3 6105 063 155 936

3 105 063 15 936